STATE OF WASHINGTON KING COUNTY SUPERIOR COURT

WASHINGTON FAMILIES STANDING TOGETHER and ANNE LEVINSON,

Plaintiffs,

v.

SECRETARY OF STATE SAM REED, in his official capacity,

Defendant.

NO. 09-2-31908-1 SEA

APPENDIX

APPENDIX OF AUTHORITIES

CITED BY

SECRETARY OF STATE SAM REED

(Provided to Court and Counsel, but not filed)

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SECTION 1 LEGISLATIVE POWERS, WHERE VESTED. The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.

(a) Initiative: The first power reserved by the people is the initiative. Every such petition shall include the full text of the measure so proposed. In the case of initiatives to the legislature and initiatives to the people, the number of valid signatures of legal voters required shall be equal to eight percent of the votes cast for the office of governor at the last gubernatorial election preceding the initial filing of the text of the initiative measure with the secretary of state.

Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. If such petitions are filed not less than ten days before any regular session of the legislature, he shall certify the results within forty days of the filing. If certification is not complete by the date that the legislature convenes, he shall provisionally certify the measure pending final certification of the measure. Such initiative measures, whether certified or provisionally certified, shall take precedence over all other measures in the legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the legislature before the end of such regular session. If any such initiative measures shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. If it is rejected or if no action is taken upon it by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election. When conflicting measures are submitted to the people the ballots shall be so printed that a voter can express separately by making one cross (X) for each, two preferences, first, as between either measure and neither, and secondly, as between one and the other. If the majority of those voting on the first issue is for neither, both fail, but in that case the votes on the second issue shall nevertheless be carefully counted and made public. If a majority voting on the first issue is for either, then the measure receiving a majority of the votes on the second issue shall be law.

(b) Referendum. The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions, either by petition signed by the required percentage of the legal voters, or by the legislature as other bills are enacted: *Provided*, That the legislature may not order a referendum on any initiative measure enacted by the legislature under the foregoing subsection (a). The number of valid signatures of registered voters required on a petition for referendum of an act of the legislature or any part thereof, shall be equal to or exceeding four percent of the votes cast for the office of governor at the last gubernatorial election preceding the filing of the text of the referendum measure with the secretary of state.

- (c) No act, law, or bill subject to referendum shall take effect until ninety days after the adjournment of the session at which it was enacted. No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment: *Provided*, That any such act, law, or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house with full compliance with section 12, Article III, of the Washington Constitution, and no amendatory law adopted in accordance with this provision shall be subject to referendum. But such enactment may be amended or repealed at any general regular or special election by direct vote of the people thereon.
- (d) The filing of a referendum petition against one or more items, sections, or parts of any act, law, or bill shall not delay the remainder of the measure from becoming operative. Referendum petitions against measures passed by the legislature shall be filed with the secretary of state not later than ninety days after the final adjournment of the session of the legislature which passed the measure on which the referendum is demanded. The veto power of the governor shall not extend to measures initiated by or referred to the people. All elections on measures referred to the people of the state shall be had at the next succeeding regular general election following the filing of the measure with the secretary of state, except when the legislature shall order a special election. Any measure initiated by the people or referred to the people as herein provided shall take effect and become the law if it is approved by a majority of the votes cast thereon: *Provided*, That the vote cast upon such question or measure shall equal one-third of the total votes cast at such election and not otherwise. Such measure shall be in operation on and after the thirtieth day after the election at which it is approved. The style of all bills proposed by initiative petition shall be: "Be it enacted by the people of the State of Washington." This section shall not be construed to deprive any member of the legislature of the right to introduce any measure. All such petitions shall be filed with the secretary of state, who shall be guided by the general laws in submitting the same to the people until additional legislation shall especially provide therefor. This section is self-executing, but legislation may be enacted especially to facilitate its operation.
- (e) The legislature shall provide methods of publicity of all laws or parts of laws, and amendments to the Constitution referred to the people with arguments for and against the laws and amendments so referred. The secretary of state shall send one copy of the publication to each individual place of residence in the state and shall make such additional distribution as he shall determine necessary to reasonably assure that each voter will have an opportunity to study the measures prior to election.

RCW 29A.40.070. Date ballots available, mailed.

- (1) Except where a recount or litigation under RCW 29A.68.011 is pending, the county auditor shall have sufficient absentee ballots available for absentee voters of that county, other than overseas voters and service voters, at least twenty days before any primary, general election, or special election. The county auditor must mail absentee ballots to each voter for whom the county auditor has received a request nineteen days before the primary or election at least eighteen days before the primary or election. For a request for an absentee ballot received after the nineteenth day before the primary or election, the county auditor shall make every effort to mail ballots within one business day, and shall mail the ballots within two business days.
- (2) At least thirty days before any primary, general election, or special election, the county auditor shall mail ballots to all overseas and service voters. A request for a ballot made by an overseas or service voter after that day must be processed immediately.
- (3) Each county auditor shall certify to the office of the secretary of state the dates the ballots prescribed in subsection (1) of this section were available and mailed.
- (4) If absentee ballots will not be available or mailed as prescribed in subsection (1) of this section, the county auditor shall immediately certify to the office of the secretary of state when absentee ballots will be available and mailed. Copies of this certification must be provided to the county canvassing board, the press, jurisdictions with issues on the ballot in the election, and any candidates.
- (5) If absentee ballots were not available or mailed as prescribed in subsection (1) of this section, for a reason other than a recount or litigation, the county auditor, in consultation with the certification and training program of the office of the secretary of state, shall submit a report to the office of the secretary of state outlining why the deadline was missed and what corrective actions will be taken in future elections to ensure that absentee ballots are available and mailed as prescribed in subsection (1) of this section.
- (6) Failure to have absentee ballots available and mailed as prescribed in subsection (1) of this section does not by itself provide a basis for an election contest or other legal challenge to the results of a primary, general election, or special election.

RCW 29A.72.130. Referendum petitions — Form.

Petitions ordering that acts or parts of acts passed by the legislature be referred to the people at the next ensuing general election, or special election ordered by the legislature, must be substantially in the following form:

The warning prescribed by RCW 29A.72.140; followed by:

PETITION FOR REFERENDUM

To the Honorable , Secretary of State of the State of Washington:

We, the undersigned citizens and legal voters of the State of Washington, respectfully order and direct that Referendum Measure No. , filed to revoke a (or part or parts of a) bill that (concise statement required by RCW 29A.36.071) and that was passed by the legislature of the State of Washington at the last regular (special) session of said legislature, shall be referred to the people of the state for their approval or rejection at the regular (special) election to be held on the day of November, (year); and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.

The following declaration must be printed on the reverse side of the petition:

I, , swear or affirm under penalty of law that I circulated this sheet of the foregoing petition, and that, to the best of my knowledge, every person who signed this sheet of the foregoing petition knowingly and without any compensation or promise of compensation willingly signed his or her true name and that the information provided therewith is true and correct. I further acknowledge that under chapter 29A.84 RCW, forgery of signatures on this petition constitutes a class C felony, and that offering any consideration or gratuity to any person to induce them to sign a petition is a gross misdemeanor, such violations being punishable by fine or imprisonment or both.

RCW <u>9A.46.020</u> applies to any conduct constituting harassment against a petition signature gatherer. This penalty does not preclude the victim from seeking any other remedy otherwise available under law.

The petition must include a place for each petitioner to sign and print his or her name, and the address, city, and county at which he or she is registered to vote.

RCW 29A.72.230. Petitions — Verification and canvass of signatures, observers — Statistical sampling — Initiatives to legislature, certification of.

Upon the filing of an initiative or referendum petition, the secretary of state shall proceed to verify and canvass the names of the legal voters on the petition. The verification and canvass of signatures on the petition may be observed by persons representing the advocates and opponents of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process except upon the order of the superior court of Thurston county. The secretary of state may limit the number of observers to not less than two on each side, if in his or her opinion, a greater number would cause undue delay or disruption of the verification process. Any such limitation shall apply equally to both sides. The secretary of state may use any statistical sampling techniques for this verification and canvass which have been adopted by rule as provided by chapter 34.05 RCW. No petition will be rejected on the basis of any statistical method employed, and no petition will be accepted on the basis of any statistical method employed if such method indicates that the petition contains fewer than the requisite number of signatures of legal voters. If the secretary of state finds the same name signed to more than one petition, he or she shall reject all but the first such valid signature. For an initiative to the legislature, the secretary of state shall transmit a certified copy of the proposed measure to the legislature at the opening of its session and, as soon as the signatures on the petition have been verified and canvassed, the secretary of state shall send to the legislature a certificate of the facts relating to the filing, verification, and canvass of the petition.

RCW 29A.72.240. Petitions to legislature — Count of signatures — Review.

Any citizen dissatisfied with the determination of the secretary of state that an initiative or referendum petition contains or does not contain the requisite number of signatures of legal voters may, within five days after such determination, apply to the superior court of Thurston county for a citation requiring the secretary of state to submit the petition to said court for examination, and for a writ of mandate compelling the certification of the measure and petition, or for an injunction to prevent the certification thereof to the legislature, as the case may be. Such application and all proceedings had thereunder shall take precedence over other cases and shall be speedily heard and determined.

The decision of the superior court granting or refusing to grant the writ of mandate or injunction may be reviewed by the supreme court within five days after the decision of the superior court, and if the supreme court decides that a writ of mandate or injunction, as the case may be, should issue, it shall issue the writ directed to the secretary of state; otherwise, it shall dismiss the proceedings. The clerk of the supreme court shall forthwith notify the secretary of state of the decision of the supreme court.

United States Code Annotated Currentness

Title 42. The Public Health and Welfare

Sample Chapter 20. Elective Franchise

<u>Subchapter I-G.</u> Registration and Voting by Absent Uniformed Services Voters and Overseas Voters in Elections for Federal Office (Refs & Annos)

→ § 1973ff-1. State responsibilities

(a) In general

Each State shall--

- (1) permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office;
- (2) accept and process, with respect to any election for Federal office, any otherwise valid voter registration application and absentee ballot application from an absent uniformed services voter or overseas voter, if the application is received by the appropriate State election official not less than 30 days before the election;
- (3) permit absent uniformed services voters and overseas voters to use Federal write-in absentee ballots (in accordance with section 1973ff-2 of this title) in general elections for Federal office;
- (4) use the official post card form (prescribed under <u>section 1973ff</u> of this title) for simultaneous voter registration application and absentee ballot application; and
- (5) if the State requires an oath or affirmation to accompany any document under this subchapter, use the standard oath prescribed by the Presidential designee under section1973ff(b)(7) of this title.
- (b) Designation of single State office to provide information on registration and absentee ballot procedures for all voters in State

(1) In general

Each State shall designate a single office which shall be responsible for providing information regarding voter registration procedures and absentee ballot procedures to be used by absent uniformed services voters and overseas voters with respect to elections for Federal office (including procedures relating to the use of the Federal write-in absentee ballot) to all absent uniformed services voters and overseas voters who wish to register to vote or vote in any jurisdiction in the State.

(2) Recommendation regarding use of office to accept and process materials

Congress recommends that the State office designated under paragraph (1) be responsible for carrying out the State's duties under this Act, including accepting valid voter registration applications, absentee ballot applications, and absentee ballots (including Federal write-in absentee ballots) from all absent uniformed services voters and overseas voters who wish to register to vote or vote in any jurisdiction in the State.

(c) Report on number of absentee ballots transmitted and received

Not later than 90 days after the date of each regularly scheduled general election for Federal office, each State and unit of local government which administered the election shall (through the State, in the case of a unit of local government) submit a report to the Election Assistance Commission (established under the Help America Vote Act of 2002) on the combined number of absentee ballots transmitted to absent uniformed services voters and overseas voters for the election and the combined number of such ballots which were returned by such voters and cast in the election, and shall make such report available to the general public.

(d) Registration notification

With respect to each absent uniformed services voter and each overseas voter who submits a voter registration application or an absentee ballot request, if the State rejects the application or request, the State shall provide the voter with the reasons for the rejection.

Supreme Court of Washington, En Banc.

COMMUNITY CARE COALITION OF WASHINGTON; Home Care of Washington, Inc.; The Fredrickson Home; Cynthia O'Neill, A Washington Citizen and Taxpayer; Ron Ralph and Lois Ralph, husband and wife and Washington Citizens and Taxpayers, Petitioners,

v.

Sam REED, Secretary of State, Respondent, and

 $Linda\ Lee\ and\ People\ for\ Safe\ Quality\ Care,\ Intervenors/Respondents.$

No. 81857-6.

Argued Sept. 4, 2008. Decided Feb. 5, 2009.

Background: Community-care coalition, taxpayers, and citizens filed original action for writ of mandamus or writ of certiorari, to compel Secretary of State to accept petitions, submitted for an initiative measure regarding background checks, training, and certification for long-term care workers, as petitions for an initiative to the legislature, and to prohibit Secretary of State from certifying the initiative measure as an initiative to the people for placement on general election ballot.

Holdings: The Supreme Court, <u>Alexander</u>, C.J., held that:

- (1) mandamus would not lie, to compel Secretary of State to reject the petitions;
- (2) mandamus would not lie, to compel Secretary of State to accept the petitions as petitions for initiative to the legislature; and
- (3) Supreme Court lacked constitutional power to directly review and revise, by writ of certiorari, the Secretary of State's decision.

Petition for writ of mandamus or certiorari dismissed.

<u>Fairhurst</u>, J., filed a dissenting opinion, in which <u>Sanders</u> and <u>Owens</u>, JJ., concurred.

West Headnotes

[1] Statutes 361 € 301

361 Statutes

361IX Initiative

<u>361k301</u> k. Initiative in General. <u>Most Cited Cases</u>

The initiative power, which the state Constitution reserves to the people, is self-executing, and the legislature's authority to affect the initiative process is limited to facilitating its operation. West's RCWA Const. Art. 2, § 1(a, d).

[2] Statutes 361 \$\iii 301\$

361 Statutes

361IX Initiative

361k301 k. Initiative in General. Most Cited Cases

The authority of the judiciary over the initiative power, which the state Constitution reserves to the people, is limited, since questions regarding the initiative process are political, not judicial, unless express statutory or constitutional laws make the question judicial. West's RCWA Const. Art. 2, § 1(a).

[3] Mandamus 250 \$\infty\$71

250 Mandamus

250II Subjects and Purposes of Relief

250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities

250k71 k. Ministerial Acts in General. Most Cited Cases

A writ of mandamus may be issued to compel a state official to perform an act the law clearly requires as part of the official's duties. <u>West's RCWA 7.16.160</u>.

[4] Mandamus 250 \$\infty\$71

250 Mandamus

250II Subjects and Purposes of Relief

250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities

250k71 k. Ministerial Acts in General. Most Cited Cases

Mandamus may be issued to prohibit an official from performing an otherwise mandatory act. West's RCWA 7.16.160.

[5] Mandamus 250 \$\infty\$72

250 Mandamus

250II Subjects and Purposes of Relief

250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities

250k72 k. Matters of Discretion. Most Cited Cases

Mandamus will not lie to compel a discretionary act by an official. West's RCWA 7.16.160.

[6] Mandamus 250 \$\infty\$74(1)

250 Mandamus

250II Subjects and Purposes of Relief

250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities

250k74 Elections and Proceedings Relating Thereto

250k74(1) k. In General. Most Cited Cases

Statutes 361 € 308

361 Statutes

361IX Initiative

361k308 k. Title and Text of Proposed Act and Other Information. Most Cited Cases Assuming that petitions, submitted for initiative measure regarding background checks, training, and certification for long-term care workers, did not substantially comply with statutory requirements for initiatives to the people because the petitions' subtitle and language of instruction used language referring to an initiative to the legislature, Secretary of State had statutory discretion to decide whether to reject a noncomplying petition for an initiative, and thus, mandamus would not lie to compel the Secretary of State to reject, as petition for initiative to the people, the petitions for the initiative measure regarding background checks, training, and certification for long-term care workers. West's RCWA 7.16.160, 29A.72.110, 29A.72.120, 29A.72.170(1).

[7] Mandamus 250 €-72

250 Mandamus

250II Subjects and Purposes of Relief

250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities 250k72 k. Matters of Discretion. Most Cited Cases

While mandamus may remedy an official's total failure to exercise discretion, it does not lie to force the official to act in a particular manner. West's RCWA 7.16.160.

[8] Mandamus 250 \$\infty\$74(1)

250 Mandamus

250II Subjects and Purposes of Relief

250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities250k74 Elections and Proceedings Relating Thereto

250k74(1) k. In General. Most Cited Cases

Statutes 361 € 308

361 Statutes

361IX Initiative

<u>361k308</u> k. Title and Text of Proposed Act and Other Information. <u>Most Cited Cases</u> Petitions for initiative measure regarding background checks, training, and certification for long-term care workers, which initiative the proponents had intended to be an initiative to the people but which petitions' subtitle and language of instruction used language referring to an initiative to the legislature, did not wholly conform to the requirements for an initiative to the legislature, as would require Secretary of State to accept the petitions as petitions for an initiative to the legislature, and thus, mandamus would not lie to compel the Secretary of State to do so; the numerical designation of the measure, its proposed legislative title, the language of the initiative measure itself, the proposed effective dates of some of its provisions, and the petition mailing deadline all suggested the initiative was intended for submission to the people. <u>West's RCWA</u> 7.16.160, 29A.72.110, 29A.72.120, 29A.72.170.

[9] Courts 106 \$\infty\$ 157.1

106 Courts

106III Courts of General Original Jurisdiction 106III(B) Courts of Particular States 106k157.1 k. Washington. Most Cited Cases

Courts 106 € 251

106 Courts

106VI Courts of Appellate Jurisdiction
106VI(B) Courts of Particular States
106k251 k. Washington. Most Cited Cases

The Supreme Court is the court of general appellate jurisdiction over judicial decisions, with limited original jurisdiction, while the Superior Court is the court of general original jurisdiction with primary power to review actions of administrative agencies. West's RCWA Const. Art. 4, § 4.

[10] Certiorari 73 \$\infty\$=20.1

73 Certiorari

73I Nature and Grounds

<u>73k20</u> Acts and Proceedings of Public Officers and Boards and Municipalities <u>73k20.1</u> k. In General. <u>Most Cited Cases</u>

Supreme Court lacked constitutional power to directly review and revise, by writ of certiorari, a decision of the Secretary of State to accept, as petitions for initiative to the people, petitions submitted for initiative measure regarding background checks, training, and certification for long-term care workers, which petitions' subtitle and language of instruction used language referring to an initiative to the legislature. West's RCWA Const. Art. 4, § 4; West's RCWA 29A.72.110, 29A.72.120, 29A.72.170(1).

**702 <u>Kathleen Dell Benedict</u>, Narda D. Pierce, Benedict Garratt Pond & Pierce, PLLC, Olympia, WA, for Petitioners.

Jeffrey Todd Even, Maureen A. Hart, Attorney General's Office, Olympia, WA, for Respondent.

Eric D. 'Knoll' Lowney, Smith & Lowney PLLC, <u>Michael Craig Subit</u>, Frank Freed Subit & Thomas LLP, Seattle, WA, for Intervenors/Respondents.

<u>Shawn Timothy Newman</u>, Attorney at Law, Olympia, WA, for Amicus Curiae on behalf of Initiative and Referendum Institute.

ALEXANDER, C.J.

*609 ¶ 1 Several petitioners led by the Community Care Coalition of Washington filed an

original action in this court seeking to compel Secretary of State Sam Reed to accept petitions submitted for Initiative Measure No. 1029 (I-1029) as petitions for an initiative to the legislature. Petitioners conversely ask us to prohibit the secretary of state from certifying I-1029 as an initiative to the people for placement on the November 2008 general election ballot. We heard the matter en banc on September 4, 2008, and issued an order on September 5 dismissing the petition with an explanatory opinion to follow in due course. This is our opinion explaining our order.

FACTS

- ¶ 2 The pertinent facts are undisputed. On March 12, 2008, Linda Lee filed with the secretary of state's office a proposed initiative dealing with background checks and training and certification of long-term care **703 workers. On the accompanying form affidavit, Lee marked the box indicating that the measure was to be submitted to the "people." Agreed Statement of Facts, Ex. A. The secretary of state's *610 office thereafter processed the proposed initiative in every respect as an initiative to the people, listing it as such on its website. The code reviser issued a certificate of review, and Lee filed the final version of the proposed initiative on March 28, 2008. On the same date, the secretary of state's office assigned the initiative the number 1029 (from a list of serial numbers reserved for initiatives to the people). See RCW 29A.72.040. The attorney general's office then drafted a ballot title and a ballot measure summary. Though given the opportunity to do so, Lee evidently did not have the secretary of state's office review the final petition form.
 - <u>FN1.</u> The parties submitted an agreed statement of facts. <u>RAP 16.2(d)</u>. Petitioners' subsequent request to take judicial notice of additional records, and intervenors' corresponding request to submit additional evidence, were both denied.
- ¶ 3 Lee and other proponents of I-1029 prepared and circulated petitions for voter signatures. Below the title graphics stating "YES" to "I-1029," the petition set forth the "BALLOT TITLE" as prepared by the attorney general's office. Agreed Statement of Facts, Ex. M. Then came the "BALLOT MEASURE SUMMARY." *Id.* Following that, the petition recited the required language addressed "*To the Honorable Sam Reed, Secretary of State of the State of Washington.*" *Id.* The language required differs depending on whether the initiative is directed to the people or to the legislature. *See* RCW 29A.72.120, .110. The petition here had a long paragraph directing that the initiative "be *transmitted to the legislature* of the State of Washington at its next ensuing regular session, and [that] *the legislature* [] *enact* said proposed measure into law." Agreed Statement of Facts Ex. M (emphasis added).
- ¶ 4 On the reverse side of the petition, immediately above the text of the initiative, a subtitle stated, "BE IT ENACTED BY THE PEOPLE OF THE STATE OF WASHINGTON." *Id.* The body of the initiative included expressions of "the intent of the people" in enacting the petition. *Id.* In numerous places the initiative would mandate the Department of Social and Health Services and the Department of Health to implement rules by August 1, 2009. It would also require innovative training methods until December 31, 2009, and certain sections of the initiative are contingent on proposed 2008 legislation taking or not taking effect. The *611 act

implemented by the initiative is to be called the "better background checks and improved training for long-term care workers for the elderly and persons with disabilities initiative of 2008." *Id.* The petition also designated a final mailing deadline of June 25, 2008, which corresponded to the final date for mailing petitions for an initiative to the people.

- ¶ 5 Around June 25, 2008, a citizen brought a blank I-1029 petition to the secretary of state's office and pointed out that language on the face of the petition indicated it was an initiative to the legislature. On July 2, petitioner Community Care Coalition of Washington urged the secretary of state to reject the I-1029 petitions. On July 3, the last day petitions for initiatives to the people could be filed with the secretary of state, Lee submitted I-1029 petitions to that office for filing and certification.
- ¶ 6 On July 14, a deputy solicitor general responded to Community Care Coalition of Washington on behalf of the secretary of state, acknowledging its concerns but informing it that the secretary had decided to process the petitions as supporting an initiative to the people notwithstanding the erroneous language in the petitions. The deputy solicitor general wrote that there was "no doubt that those who filed and circulated the petitions on I-1029 intended to file and process an initiative to the people and built their petition campaign around the constitutional deadlines for this form of an initiative." Agreed Statement of Facts Ex. O, at 3. The deputy solicitor general indicated, further, that he was not aware of any evidence that the proponents or the press ever described the initiative as one to the legislature or noted the potential ambiguity on the face of the petition. Nor was there any basis, he said, to believe that the form of the petition influenced the number of valid signatures gathered for the initiative. The deputy solicitor general further wrote that rejecting the petitions "would fail to afford Washington's voters the opportunity to consider, and either **704 approve or reject the measure, where a constitutionally requisite number of qualified voters express support for its enactment to be considered." *Id*.
- *612 ¶ 7 On July 18, petitioner Cynthia O'Neill asked the attorney general by letter to file an action against the secretary of state to prevent him from processing the I-1029 petitions as supporting an initiative to the people and to require him instead to process the measure as an initiative to the legislature. Petitioners then filed this original action in this court on July 22. The solicitor general subsequently informed petitioners that the secretary of state had acted within his lawful discretion and that the attorney general's office would defend the secretary in this matter.
- ¶ 8 Lee and People for Safe Quality Care, the official committee supporting I-1029, have intervened in the action, and the Initiative and Referendum Institute has filed an amicus curiae brief supporting the petition. After we denied petitioners' motion for an emergency injunction, the secretary of state certified I-1029 as an initiative to the people on August 13, 2008. The voters approved I-1029 in the November 4, 2008, general election.

ANALYSIS

[1][2] ¶ 9 The initiative is "[t]he first power reserved by the people." CONST. art. II, § 1(a). This power is self-executing, and the legislature's authority to affect the initiative process is limited to facilitating its operation. CONST. art. II, § 1(d). Similarly, the authority of the judiciary over the

process is limited, since questions regarding the initiative process are political, not judicial, unless express statutory or constitutional laws make the question judicial. <u>Schrempp v. Munro</u>, <u>116 Wash.2d 929</u>, 932, 809 P.2d 1381 (1991) (quoting <u>State ex rel. Donohue v. Coe</u>, 49 Wash.2d 410, 417, 302 P.2d 202 (1956)).

- ¶ 10 There are two types of initiatives, those to the legislature and those to the people. CONST. art. II, $\S 1(a)$. Apart from a general requirement that every initiative petition set forth the full text of the proposed measure, the constitution is silent on the precise form of such petitions. *Id.* Consistent with its constitutional authority to facilitate *613 the initiative process, the legislature enacted provisions relating to the initiative process and petition forms. *See* ch. 29A.72 RCW.
- ¶ 11 Whether the petition is for an initiative to the legislature or for an initiative to the people, the petition "must be substantially" in the form provided under RCW 29A.72.110 (initiative to the legislature) or RCW 29A.72.120 (initiative to the people). See RCW 29A.72.170. These provisions, in turn, specify the following headings: "INITIATIVE PETITION FOR SUBMISSION TO THE LEGISLATURE" or "INITIATIVE PETITION FOR SUBMISSION TO THE PEOPLE." RCW 29A.72.110, .120. If the initiative is to be submitted to the legislature, it must state that the signers direct the secretary of state to transmit the measure to the "legislature" and that they "petition the legislature to enact" the proposed measure. RCW 29A.72.110. If the initiative is to be submitted to the people, it must state that the signers direct the proposed measure "be submitted to the legal voters of the State of Washington for their approval or rejection at the general election." RCW 29A.72.120.
- ¶ 12 The I-1029 petition was flawed. To the extent it was meant to be a petition for an initiative to the people, it lacked the capitalized subtitle indicating that it was an "INITIATIVE PETITION FOR SUBMISSION TO THE PEOPLE." RCW 29A.72.120. And the language of instruction directed to the secretary of state was in the form required for initiatives to the legislature. But to the extent the petition identified the initiative as one to the legislature, it failed to meet the requirements of RCW 29A.72.110 by not prominently announcing that it involved an "INITIATIVE PETITION FOR SUBMISSION TO THE LEGISLATURE."
- ¶ 13 The issue now is whether this court should intervene in the secretary of state's decision to treat the petition as one supporting an initiative to the people. Petitioners' challenge to the secretary's action is two-pronged, but both arguments focus on **705RCW 29A.72.170. That statute states *614 in relevant part that the secretary "may refuse to file any initiative ... petition being submitted" if "the petition does not contain the information required by RCW 29A.72.110 [or] 29A.72.120." RCW 29A.72.170(1). But if no ground for refusal exists, the secretary "must accept and file the petition." RCW 29A.72.170. Petitioners argue that because the petition did not contain the language required by RCW 29A.72.120, directing the secretary to submit the initiative to the people, the secretary erroneously certified the initiative for placement on the November 2008 ballot. Conversely, petitioners argue that because the petition did contain the instructional language required for initiatives to the legislature, the secretary had no choice but to accept and file the petition as one for an initiative to the legislature.
- ¶ 14 At the outset, petitioners acknowledge they have no statutory right to challenge the

secretary's decision to accept and file the petition as a petition for an initiative to the people. The statutes permit a challenge only to the secretary's refusal to file a petition, and that right of challenge extends only to the persons submitting the petition for filing. RCW 29A.72.180; Schrempp, 116 Wash.2d at 934-35, 809 P.2d 1381. Petitioners instead seek to invoke this court's jurisdiction by seeking a writ of mandamus or a writ of certiorari requiring the secretary to certify I-1029 to the legislature. See CONST. art. IV, § 4; Wash. State Labor Council v. Reed, 149 Wash.2d 48, 54, 65 P.3d 1203 (2003).

[3][4][5][6] ¶ 15 Considering first mandamus, a writ of mandamus may be issued to compel a state official to perform an act the law clearly requires as part of the official's duties. RCW 7.16.160; Wash. State Council of County & City Employees, Council 2 v. Hahn, 151 Wash.2d 163, 166-67, 86 P.3d 774 (2004); Walker v. Munro, 124 Wash.2d 402, 408, 879 P.2d 920 (1994). And mandamus may also be issued to prohibit an official from performing an otherwise mandatory act. Wash. State Labor Council, 149 Wash.2d at 55, 65 P.3d 1203. Mandamus has been used to consider actions of the secretary of state in relation to initiatives and referenda. *615Id. at 54-55, 65 P.3d 1203; Wash. State Farm Bureau Fed'n v. Reed, 154 Wash.2d 668, 672, 115 P.3d 301 (2005). But mandamus will not lie to compel a discretionary act. *In re Pers*. Restraint of Dyer, 143 Wash.2d 384, 398, 20 P.3d 907 (2001). As indicated, the secretary "may" refuse to file an initiative petition if the petition omits the information for initiatives to the people required by RCW 29A.72.120. RCW 29A.72.170(1). The secretary therefore has "discretionary authority" to decide whether to reject a noncomplying petition. Schrempp, 116 Wash.2d at 934, 938, 809 P.2d 1381. Thus, even accepting petitioners' assertion that the petition here did not substantially comply with the statutory requirements for initiatives to the people, because the secretary had no clear mandatory duty to reject the petition on that basis, mandamus does not lie to compel him to do so.

[7][8] ¶ 16 But as discussed, petitioners also argue that because the secretary "must accept and file" a petition that contains the information required, RCW 29A.72.170, and because here the petition contained the required information for initiatives to the legislature, the secretary was required to accept the petition as a petition for an initiative to the legislature. As related above, however, the petition did not wholly conform to the requirements of RCW 29A.72.110 for initiatives to the legislature. And further, the numerical designation of the measure, its proposed legislative title, the language of the initiative measure itself, the proposed effective dates of some of its provisions, and the petition mailing deadline all suggested the initiative was intended for submission to the people. In short, the petition was sufficiently ambiguous that the secretary was not duty-bound to accept it only as a petition for an initiative to the legislature. Moreover, RCW 29A.72.170 presupposes that a petition has been submitted by a proponent, hence the companion provision in RCW 29A.72.180 allowing a proponent to challenge the secretary's refusal to file a petition. In this case, no proponent seeks to advance an initiative to the legislature. Petitioners seek to use the writ of mandamus to pursue relief that **706 would have *616 been available only to proponents of an initiative to the legislature.

<u>FN2.</u> The dissent acknowledges that mandamus will not lie to control a discretionary act but then essentially urges this court to do just that. While mandamus may remedy an official's total failure to exercise discretion, it does not lie to force the official to act in a

particular manner. Nat'l Elec. Contractors Ass'n, Cascade Chapter v. Riveland, 138 Wash.2d 9, 32, 978 P.2d 481 (1999); see also Vangor v. Munro, 115 Wash.2d 536, 543, 798 P.2d 1151 (1990). In this connection, RCW 29A.72.170(1) plainly states the secretary of state "may" refuse to file a noncomplying initiative petition, signaling his discretionary authority. See Schrempp, 116 Wash.2d at 934, 938, 809 P.2d 1381. As discussed above, the factual record amply demonstrates that the secretary of state made a reasoned decision to not reject the petitions and to file them as supporting an initiative to the people, not inconsistent with ambiguities on the petitions and entirely consistent with the underlying history of the petitions as known to the secretary. Mandamus will not lie to direct the secretary of state to exercise his discretion differently.

¶ 17 As discussed, petitioners also seek a writ of certiorari. While this court has original jurisdiction in habeas corpus, quo warranto, and mandamus as to all state officers, it also has the power to issue writs of certiorari "and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction." CONST. art. IV, § 4. Petitioners rely on North Bend Stage Line v. Department of Public Works, 170 Wash. 217, 16 P.2d 206 (1932), in urging us to exercise our constitutional jurisdiction to review directly the secretary of state's filing of the I-1029 petitions. In our view, petitioners read *North Bend* too broadly. In that case, we struck down a statute giving this court exclusive jurisdiction to review decisions of the Department of Public Works, holding that the court's appellate jurisdiction permits review of decisions of only a purely judicial nature. Id. at 221-22, 16 P.2d 206. The decision had the effect of reviving a former statute that properly lodged review authority in the superior court. *Id.* at 228, 16 P.2d 206. But meanwhile the time for seeking superior court review had lapsed through no fault of the party seeking review. Id. Under those highly unusual circumstances, a majority of the court said it would review the department's order pursuant to the court's discretionary certiorari jurisdiction. Id. at 229, 16 P.2d 206. Finding no reason for judicial interference with the department's order, the court denied relief and dismissed the proceedings. <u>Id. at 232, 16 P.2d 206.</u> Soon thereafter, this *617 court relied on North Bend in considering and reversing an otherwise unreviewable public works order. See generally Kitsap County Transp. Co. v. Dep't of Public Works, 170 Wash. 396, 16 P.2d 828 (1932).

[9][10] ¶ 18 The highly unusual circumstances confronted in *North Bend* are not present here. Perhaps more importantly, *North Bend* did not meaningfully address whether this court had jurisdiction to issue a writ of certiorari under article IV, section 4 of our constitution. Rather, the court considered a statutory writ of review filed directly in this court pursuant to the statute ultimately held to be unconstitutional. *See North Bend*, 170 Wash. at 218, 222, 16 P.2d 206. The court then filled the resulting vacuum by exercising its "constitutional certiorari jurisdiction" to review an administrative decision that would have otherwise been challenged in superior court. *Id.* at 229, 16 P.2d 206. That narrow holding does not support the broader proposition that a writ of certiorari may issue for direct review of a decision of the secretary of state. As we indicated in a later decision, *North Bend* generally clarified that under article IV, section 4, this court is the court of general appellate jurisdiction over judicial decisions, with limited original jurisdiction, while the superior court is the court of general original jurisdiction with primary power to review actions of administrative agencies. *Dep't of Highways v. King County Chapter, Wash. Envtl. Council*, 82 Wash.2d 280, 284-85, 510 P.2d 216 (1973). Article IV, section 4 grants this court

the power to issue writs of certiorari only as "necessary and proper to the complete exercise of its appellate and revisory jurisdiction." While modern courts have searched in vain for what is encompassed by the term "revisory jurisdiction," see <u>Morrison v. Superior Court</u>, 10 Ariz.App. 601, 461 P.2d 170 (1969), we reject the proposition that this court has the constitutional power to directly review and revise a decision of the secretary **707 of state, as opposed to a decision of this court or a lower tribunal.

- ¶ 19 Our decision in <u>Schrempp</u> does not aid petitioners. The appellants there argued that this court should exercise *618 its inherent equity power to intervene in cases of election fraud and wrongdoing. <u>Schrempp</u>, 116 Wash.2d at 936-37, 809 P.2d 1381. We first responded that the appellants' broad statement of principle excluded their own claim, since the case involved neither election fraud nor wrongdoing. <u>Id.</u> at 937, 809 P.2d 1381. But we saw a more fundamental flaw in this argument. We found it necessary to more thoroughly explain this court's power of review: "[d]espite the unavailability of either direct or discretionary review, we may, in unusual circumstances, exercise our inherent power ... to determine if *the trial court's* decision is arbitrary, capricious, or contrary to law.' "<u>Id.</u> (emphasis added) (quoting <u>Kreidler v. Eikenberry</u>, 111 Wash.2d 828, 837, 766 P.2d 438 (1989)). We stated that the appellants had confused this simple standard for reviewing trial court decisions with the constitutional question of the power and extent of judicial review. <u>Id.</u>
- ¶ 20 Thus, <u>Schrempp</u> does not stand for the proposition that this court can directly review a decision of the secretary of state to determine whether it is arbitrary or capricious or contrary to law. Even assuming that the appellants' arguments in that case raised the question of inherent power to review, we held that their contention of arbitrary and capricious conduct failed. <u>Id.</u> Likewise, petitioners' claims here that the secretary acted arbitrarily, capriciously, or contrary to law fail. We have already seen that the secretary's decision here was not clearly contrary to the law, since he acted within his discretionary authority. <u>See Schrempp</u>, 116 Wash.2d at 934, 937, 809 P.2d 1381. The question then is whether his action was arbitrary and capricious, a "'willful and unreasoning action, without consideration and in disregard of facts or circumstances'." <u>Id.</u> at 938, 809 P.2d 1381 (internal quotation marks omitted) (quoting <u>Kreidler</u>, 111 Wash.2d at 837, 766 P.2d 438).
 - <u>FN3.</u> The dissent does not address our court's lack of original jurisdiction under the constitution to directly review the secretary of state's action. *See* CONST. art. IV, § 4.
- ¶ 21 The agreed facts show Lee clearly intended an initiative to the people when she checked the corresponding box on the petition application form, and the secretary *619 acknowledged that intent in processing and numbering the initiative as one to the people and in designating it as such on his office's website before the petition error came to light. Also, as discussed, the petition was ambiguous in that it could be interpreted as supporting either an initiative to the people or an initiative to the legislature. The face of the petition boldly proclaimed "YES" to "I-1029," followed by a "BALLOT TITLE" and a "BALLOT MEASURE SUMMARY." Agreed Statement of Facts, Ex. M. The four-digit number designating the initiative could only indicate an initiative to the people. The popular title and language of the measure itself was reflective of an initiative to the people. Moreover, several provisions of the measure indicated effective dates

consistent only with a voter initiative to be voted upon in November 2008. Significantly, the petition indicated a mail return deadline of June 25, 2008, consistent with an initiative to the people. In light of these undisputed facts, the secretary's decision to file the petitions as supporting an initiative to the people, as the sponsor intended, was not arbitrary and capricious.

- ¶ 22 The ambiguities in the petition also undercut amicus's contention that the will of the voters who signed the petitions will be thwarted if the initiative is submitted to the people rather than the legislature. To the contrary, all voters will have an opportunity to cast their votes for or against the initiative. Requiring the secretary of state to file the initiative as one to the legislature, contrary to the undisputed intent of the initiative sponsor, would surely frustrate the initiative rights of voters who signed the initiative believing it was directed to the people, a scenario as likely as its opposite.
- ¶ 23 In any event, this case is fundamentally about the secretary of state's discretion in processing initiative petitions. The secretary had a reasoned basis to exercise his statutory discretion and accept the petitions as supporting**708 an initiative to the people, notwithstanding the identified flaws. As in <u>Schrempp</u>, petitioners here fail to demonstrate *620 grounds justifying the exercise of this court's narrow constitutional powers. EN4

FN4. Petitioners rely on three foreign authorities. See Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics, 441 A.2d 889 (D.C.1981) (plurality opinion); Nist v. Herseth, 270 N.W.2d 565 (S.D.1978); Thomson v. Wyo. In-Stream Flow Comm., 651 P.2d 778 (Wyo.1982). But all three decisions are distinguishable. In the District of Columbia case, supporters of a substantively invalid initiative measure sought to amend the measure to render it valid while petitions were in circulation. Convention Ctr. Referendum Comm., 441 A.2d at 900. The court held in a plurality decision that the initiative bill could not be materially revised after circulation. Id. at 901. The court also held the measure was barred because it fell outside the scope of the people's initiative power. Id. at 915. Here, the substantive validity of I-1029 is not at issue and there was no material alteration to the measure itself. Nist turned on numerous signature verification problems resulting in an insufficient number of valid signatures to allow the proposed measure to go forward. See Nist, 270 N.W.2d at 568-72. The Wyoming decision that petitioners cite discussed similar verification problems and a lack of sufficient signatures. Thomson, 651 P.2d at 783-84. These fatal flaws are not involved here.

¶ 24 Accordingly, the petition is dismissed.

WE CONCUR: <u>CHARLES W. JOHNSON</u>, <u>BARBARA A. MADSEN</u>, <u>JAMES M. JOHNSON</u>, <u>DEBRA L. STEPHENS</u>, <u>TOM CHAMBERS</u>, JJ. FAIRHURST, J. (dissenting).

¶ 25 The majority concludes Secretary of State Sam Reed did not exceed the limits of his discretion by certifying Initiative Measure No. 1029 (I-1029) as a petition to the people despite the petition's failure to include the key requirement of RCW 29A.72.120, language directing the secretary of state to submit I-1029 to the people. Because I conclude the requirements of RCW 29A.72.120 limit the secretary of state's discretion by mandating that petitions substantially

comply with that statute, I dissent.

¶ 26 The majority correctly observes that mandamus will not lie to compel a discretionary duty. Majority at 705 (citing *In re Pers. Restraint of Dyer*, 143 Wash.2d 384, 398, 20 P.3d 907 (2001)). Were the analysis to end there, however, the purpose of mandamus proceedings-" "to protect the rights, interests, and franchises of the state, and the rights and interests of the whole people, to enforce the performance of high official duties affecting the public at *621 large" "would be defeated. *Wash. State Labor Council v. Reed*, 149 Wash.2d 48, 54, 65 P.3d 1203 (2003) (quoting *State ex rel. O'Connell v. Meyers*, 51 Wash.2d 454, 459-60, 319 P.2d 828 (1957)) (quoting *State ex rel. Malmo v. Case*, 25 Wash.2d 118, 123, 169 P.2d 623 (1946)). In order to determine whether mandamus will lie, we must determine not only whether the duty is discretionary, but also the authorized boundaries of discretion.

Mandamus issues to compel an officer to perform a purely ministerial duty. It can not be used to compel or control a duty in the discharge of which by law he is given discretion. The duty may be discretionary within limits. He can not transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them. The power of the court to intervene, if at all, thus depends upon what statutory discretion he has. Under some statutes, the discretion extends to a final construction by the officer of the statute he is executing.

Work v. United States ex rel. Rives, 267 U.S. 175, 177, 45 S.Ct. 252, 69 L.Ed. 561 (1925).

- ¶ 27 The secretary of state has discretion to determine whether a petition satisfies the statutory requirements for filing. State ex rel. Harris v. Hinkle, 130 Wash. 419, 429, 227 P. 861 (1924). That discretion, however, is not unlimited. Id. at 435, 227 P. 861 (permitting withdrawals of signatures after petitions are preliminarily filed is a "manifest abuse of power"); Sudduth v. Chapman, 88 Wash.2d 247, 255, 558 P.2d 806, 559 P.2d 1351 (1977) (secretary of state abused discretion by not taking affirmative steps to correct irregularities in voter records which resulted in disenfranchisement). The majority rightly concludes the secretary of state's discretion to accept or reject petitions to the people is limited by RCW 29A.72.170. I differ from the majority in concluding that the mandatory language in RCW 29A.72.120 additionally **709 limits the secretary of state's discretion by prohibiting the acceptance of petitions to the people that do not substantially comply with RCW 29A.72.120. By assuming the secretary of state has discretion to accept a petition for an *622 initiative to the people without first determining whether the petition has met the requirements of RCW 29A.72.120, the majority extends boundaries of the secretary of state's discretion beyond that authorized by chapter 29A.72 RCW.
- ¶ 28 RCW 29A.72.120 prescribes the form required for petitions to the people and mandates that petitions substantially comply with its requirements. It requires a statutory warning; a title; a capitalized subtitle identifying the initiative as one to the people; a paragraph set out in the statute which includes language directing the secretary of state to submit the petition to the people, the date of the election, a statement that the petitioners are legal voters who have personally signed the petition, the address of each petitioner, and a declaration that each petitioner has signed the petition only once; a declaration on the reverse side of the petition signed by the person circulating the petition; and a place for each petitioner to sign and print his

name, address, and county in which he is registered to vote. <u>RCW 29A.72.120</u>. If a petition fails to include all the required information, the secretary of state has discretion to accept and file it under <u>RCW 29A.72.170</u>. If a petition to the people contains all of the information required by <u>RCW 29A.72.120</u>, bears sufficient signatures, and is timely filed, the secretary of state "must accept and file the petition." <u>RCW 29A.72.170</u>.

¶ 29 Read together, <u>RCW 29A.72.120</u> and .170 limit the secretary of state's discretion by allowing him to reject petitions that do not contain all the information required by <u>RCW 29A.72.120</u>, preventing acceptance of those that do not at least "substantially" comply, and requiring acceptance of those that perfectly comply.

The statute provides that the Secretary of State *may* refuse to file a petition if it is not in the form required by the statute. The statute sets out a form of petition and requires that the petition be *substantially* in that form. Inherent in the decision of the Secretary of State to accept and file this petition was his determination that the petition was substantially in the form required.

- *623 <u>Schrempp v. Munro</u>, 116 Wash.2d 929, 937, 809 P.2d 1381 (1991) (citations omitted). Thus, whether the secretary of state has discretion to accept a petition to the people depends upon whether the petition substantially complies with <u>RCW 29A.72.120</u>. This is consistent with our policy of liberally construing statutes regulating the elective process in favor of the voters by overlooking technical noncompliance while strictly enforcing provisions that prevent fraud and disenfranchisement. *Sudduth*, 88 Wash.2d at 254-55, 558 P.2d 806.
- ¶ 30 We have defined substantial compliance as "'actual compliance in respect to the substance essential to every reasonable objective of [a] statute.'" <u>Weiss v. Glemp</u>, 127 Wash.2d 726, 731, 903 P.2d 455 (1995) (alteration in original) (internal quotation marks omitted) (quoting <u>City of Seattle v. Pub. Employment Relations Comm'n</u>, 116 Wash.2d 923, 928, 809 P.2d 1377 (1991)). Chapter 29A.72 RCW exists to facilitate the exercise of the people's initiative right. <u>Schrempp</u>, 116 Wash.2d at 932, 809 P.2d 1381. The question here is whether the language specifically designating the initiative as one to the people, as opposed to one to the legislature, is "'the substance essential to'" facilitating the initiative right. <u>Weiss</u>, 127 Wash.2d at 731, 903 P.2d 455 (internal quotation marks omitted) (quoting <u>City of Seattle</u>, 116 Wash.2d at 928, 809 P.2d 1377). I conclude that it is.
- ¶ 31 The distinction between petitions to the legislature and petitions to the people is important. An initiative to the people becomes the law of the state as it is written upon passage in the general election. The legislature may not amend the law for two years after its enactment except by a two-thirds majority of all members of each house. CONST. art. II, § 41. An initiative to the legislature allows the legislature to propose alternative legislation that will be placed before the voters along with the initiative. CONST. art. II, § 1(a). If the legislature **710 rejects the initiative, it will be placed before the voters at the next general election. *Id.* Even if the legislature enacts the measure, it is subject to additional review through the referendum process. *Id.*

- *624 ¶ 32 Because the paths followed by initiatives directed to the people and those directed to the legislature are so different, the language on the petition identifying its path must be clear and direct. Chapter 29A.72 RCW provides a model form for the two types of initiatives to fulfill this important notice requirement. RCW 29A.72.110, .120. The only information required by RCW 29A.72.120 differentiating a petition to the people from a petition to the legislature is the capitalized title, "INITIATIVE PETITION FOR SUBMISSION TO THE PEOPLE," and the language directing the secretary of state to submit the petition to the people. Compare RCW 29A.72.120 with .110. This information is vital because it is the only statutorily required information that directly identifies for voters whether they are signing a petition that will be placed on the ballot at the next general election or will be submitted to the legislature. It is by this language that the petitioners direct the actions of the secretary of state. Thus, the notice requirements identifying the types of initiatives cannot simply be dismissed because "all voters will have an opportunity to cast their votes for or against the initiative" in the general election. Majority at 707.
- ¶ 33 Petitions that do not contain language clearly identifying the type of initiative proposed do not substantially comply with RCW 29A.72.110 or .120, because they fail to put voters on notice as to the type of initiative and they fail to provide accurate direction to the secretary of state. Rather than facilitating the initiative process, such fatally flawed petitions inhibit the process by obscuring an important element of the measure. With regard to initiative titles, we have defined sufficient notice as that which "'would lead to an inquiry into the body of the act, or indicate to an inquiring mind the scope and purpose of the law.'" Wash. State Grange v. Locke, 153 Wash.2d 475, 497, 105 P.3d 9 (2005) (quoting Young Men's Christian Ass'n v. State, 62 Wash.2d 504, 506, 383 P.2d 497 (1963)). Similarly, adequate notice as to the type of initiative need not perfectly mimic the format of RCW 29A.72.110 or .120 but *625 must be sufficient to indicate to a petitioner the path down which the initiative will travel.
- ¶ 34 We found substantial compliance-and thus sufficient notice-in <u>Schrempp</u>. There, we concluded the secretary of state had not acted contrary to law because the petitions at issue contained clear language stating that the initiative was to the legislature in addition to a subheading labeling the petition an initiative to the people. <u>Schrempp</u>, 116 Wash.2d at 938, 809 <u>P.2d 1381</u>. The face of the petition described the initiative as one to the legislature twice in its operative paragraph and contained large print above the signature line stating: " 'WASHINGTON STATE VOTERS SIGN BELOW TO SUBMIT INITIATIVE 120 TO THE LEGISLATURE IN 1991.' " <u>Id. FNI</u> The secretary of state thus acted according to his statutorily prescribed discretion in accepting a petition that substantially met the requirements of the statute by providing notice to petitioners and direction to the secretary of state. <u>Id.</u> at 933, 938, 809 P.2d 1381.

<u>FN1.</u> [O]n the front of the petitions there appear the operative words of the petition, *i.e.*, that it is addressed to the Secretary of State and that the undersigned citizens and legal voters direct that the proposed measure 'be transmitted *to the legislature*' and that the signers 'petition the *legislature* to enact said proposed measure into law.' In a box headed 'NOTE' it states that '200,000 signatures are needed to place Initiative 120 *before the Legislature*.' Above the lines on which voters sign, there appears in capital letters:

'WASHINGTON STATE VOTERS SIGN BELOW TO SUBMIT INITIATIVE 120 TO THE LEGISLATURE IN 1991.'

Schrempp, 116 Wash.2d at 933, 809 P.2d 1381.

- ¶ 35 By contrast, the I-1029 petition contains no language directly identifying the initiative as one to the people but does contain language by which "the undersigned citizens and legal voters … respectfully direct that this petition … be transmitted to the legislature of the State of Washington." Agreed Statement of Facts, Ex. M. The petition fails to substantially comply with the requirements for an initiative to the people but does substantially-though not perfectly**711 comply with the requirements for an initiative to the legislature. The secretary of state thus had discretion to accept or reject the petition as a petition to the *626 legislature but had no discretion to accept the I-1029 petition as a petition to the people.
- ¶ 36 By accepting I-1029 as a petition to the people, Secretary of State Reed ignored the direction of the petitioners and acted contrary to law by waiving the requirement that the petition substantially comply with RCW 29A.72.120. Although in this case there is no evidence that petitioners were misled or that the sponsors of I1029 intentionally created an ambiguity, the majority's broad construction of the secretary of state's discretion under chapter 29A.72 RCW, essentially making compliance with RCW 29A.72.120 up to the discretion of the secretary of state, leaves the way open for those who intentionally create ambiguities for political advantage. A writ prohibiting certification of I-1029 as a petition to the people is, therefore, an appropriate action in this case, and in fact is required in order to protect the integrity of the initiative process. I dissent.

WE CONCUR: SUSAN OWENS, and RICHARD B. SANDERS, JJ.

Wash.,2009. Community Care Coalition of Washington v. Reed 165 Wash.2d 606, 200 P.3d 701

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Supreme Court of Washington, En Banc. H. E. DONOHOE, Petitioner and Relator,

V.

W. G. SHEARER, as County Auditor, Respondent,

The Superior Court of Lewis County, The Honorable John J. Langenbach, Judge, Respondent. **No. 34905.**

Oct. 9, 1958.

Original proceeding for writ of certiorari to review judgment denying relator's application for writ of mandate to prohibit city auditor from transmitting name of candidate for office of justice of peace to Secretary of State as qualified and eligible, and from listing his name in notice to be published for general election. The Supreme Court, Weaver, J., held that where Secretary of State, as statutory chief election officer, prepared election calendar after receiving advice from state Attorney General, declaring that July 21 was last day candidate could file his declaration of candidacy and calendar was given wide publicity, declarant had right to rely thereon, though final filing date under mandatory statute was July 20.

Judgment affirmed.

West Headnotes

[1] Elections 144 \$\infty\$ 126(5)

144 Elections

144VI Nominations and Primary Elections

144k126 Nomination by Primary Election

144k126(5) k. Ballots. Most Cited Cases

Statute providing that no candidate's name shall be printed on primary ballot unless declaration of candidacy is filed not earlier than preceding July 1 nor later than preceding July 20, is mandatory. RCW 29.04.060, 29.18.030.

[2] Elections 144 © 126(1)

144 Elections

144VI Nominations and Primary Elections

144k126 Nomination by Primary Election

144k126(1) k. In General. Most Cited Cases

Where Secretary of State, as statutory chief election officer, prepared election calendar after advice from state Attorney General, declaring that July 21 was last day candidate could file his declaration of candidacy, and calendar was given wide publicity, declarant had right to rely thereon, though final filing date under mandatory statute was July 20. RCW 29.04.060, 29.04.070, 29.18.030.

*27 **317 C. D. Cunningham, Centralia, for relator.

John J. Sullivan, Seattle, John Evich, Seattle, amici curiae for relator.

John J. Panesko, Chehalis, for respondents.

John J. O'Connell, John W. Riley, Gerald F. Collier, Olympia, amici curiae for respondents.

*28 WEAVER, Justice.

By writ of certiorari, relator presents for our consideration the legality of a judgment entered September 23, 1958, by the superior court for Lewis county. The judgment denied relator's application for a writ prohibiting the county auditor from (a) transmitting to the secretary of state the name of J. A. Vander Stoep as a qualified and eligible candidate for the office of justice of the peace, and from (b) listing his name as an eligible candidate for said office in the notice to be published for the general election to be held November 4, 1958.

The facts are not in dispute.

At least three months prior to the first day that declarations of candidacy for elective office could be filed, the secretary of state, as the statutory chief election officer of the state (RCW 29.04.070), prepared and caused to be distributed throughout the state a '1958, State of Washington Official State Election Calendar.' This calender sets forth the various events which must occur in the election process and the dates thereof, and also includes detailed references to the state statutes which govern the process. The calendar is promulgated as part of the statutory duties required of the secretary of state as chief election officer. RCW 29.04.060.

The trial court found, and error is not assigned to the finding, that

'The official state election calendars for the years 1952 [which presented a similar question] and 1958, marked Exhibits I and II were prepared by and distributed by the Secretary of State to each and every election officer in the state of Washington and promulgated to the general public, in that five thousand copies of each calendar were distributed to public libraries, newspapers, radio stations, and the central committees of the various political parties.'

July 20, 1958, was a Sunday. The office of the respondent county auditor was closed on July 19 and July 20, 1958.

The official state election calendar designated Monday, July 21, 1958, as the last day a candidate could file his declaration of candidacy. It stated as authority:

*29 'RCW 29.18.030 (Sec. 1, Chap. 234, Laws 1947). Filing period for state primary set as July 1st to 20th, inclusive. However, Attorney General opinion dated 9/12/51 extends period to

Monday, July 21st, since last day falls on Sunday.'

The respondent county auditor, relying upon and acting pursuant to the direction of the secretary of state, accepted and filed Mr. Vander Stoep's declaration of candidacy on Monday, July 21, 1958.

Had three or more candidates filed for the office of justice of peace of Chehalis precinct, Lewis county, Washington-a nonpartisan judicial office-the elective selection would have been submitted to the voters at the primary election on September 9, 1958. Only two candidates, however, filed for the office, of whom Mr. Vander **318 Stoep was one; hence, pursuant to RCW (1955 Sup.) 29.21.180, the name of neither of said candidates was printed upon the official ballot for the primary election.

The sole question is whether Mr. Vander Stoep's declaration of candidacy was timely filed in the office of the county auditor, so that his name may appear as a candidate of the official ballot for the general election to be held November 4, 1958.

RCW 29.18.030, to which reference is made in the official state election calendar, provides

'[1] The name of no candidate shall be printed upon the official ballot used at a September primary, unless not earlier than the preceding July 1st nor later than the preceding July 20th, a declaration of candidacy is filed in the form hereinafter set forth, nor [2] at any other primary election unless at least forty-five and not more than sixty days prior to such primary, a declaration of candidacy has been filed by him as provided in this chapter * * *.' (Portions of statute numbered by us for reference, *infra*.)

Generally, there are three types of statutes that fix the time in which an action must be performed. In the first, the *initial* and *terminal* dates are specified. In the second, the act must be done 'at least' a stated number of days 'and not more than' a stated number of days 'prior to' a fixed date. In the third, the act must be done within a fixed *30 number of days after an initial date. Seldom is the question raised that the act was done prematurely. Usually, the question is whether the act was *timely* done or was performed within the time limited by the terminal date.

<u>RCW 29.18.030</u>, supra, (Laws of 1947, chapter 234, § 1), combines the first two types of statute in the same sentence. That portion of <u>RCW 29.18.030</u> designated as (1) applies to the September primaries and fixes the *initial* and *terminal* dates of the period in which a declaration of candidacy may be filed.

That portion of the statute designated as (2) applies to other primary elections and requires that a declaration of candidacy be filed 'at least forty-five and not more than sixty days prior to such primary.'

There is one obvious difference between the two portions of the statute: The first does not

require a computation of time; the second portion does and requires that the initial and terminal dates be determined by counting *backward* from the date of the primary election. The chance, however, that the terminal date for filing a declaration of candidacy will fall on a Sunday or a holiday is equal under both portions of the statute.

RCW 1.12.040 provides:

'The time within which an act is to be done, as herein provided, shall be computed by excluding the first day, and including the last, unless the last day is a holiday or Sunday, and then it is also excluded.' See also RCW 4.28.005. FN1

FN1. The legislative history of these two statutes (RCW 1.12.040 and RCW 4.28.005) seems to indicate that they apply only to practice and proceedings in civil actions. See titles of chapters appearing in Laws of 1854, chapter 3, § 486; Code of 1881, § 743; Laws of 1893, chapter 127, § 26. However, Allen v. Morris, 1915, 87 Wash. 268, 274, 151 P. 827; State ex rel. Evans v. Superior Court, 1932, 168 Wash. 176, 179, 11 P.2d 229; State v. Levesque, 1940, 5 Wash.2d 631, 635, 106 P.2d 309; and State ex rel. Earley v. Batchelor, 1942, 15 Wash.2d 149, 130 P.2d 72, treat these statutes as being of general application; hence, the appearance of RCW 1.12.040 in the chapter entitled 'Rules of Construction.'

This statute, substantially in its present form, has been the law of this jurisdiction since territorial days. It first *31 appeared in Laws of 1854, § 486, p. 219; Code of 1881, § 743. In Van Duyn v. Van Duyn, 1924, 129 Wash. 428, 225 P. 444, 227 P. 321, the court indicated that this section adopted what would be the general rule in the absence of statute.

**319 We need not consider the third type of 'time' statute-that an act must be done within a fixed number of days after an initial date-because it is not involved in the instant case.

In <u>State ex rel. Earley v. Batchelor, 1942, 15 Wash.2d 149, 130 P.2d 72</u>, the court considered the second type of 'time' statute as encompassed in the second part of <u>RCW 29.18.030</u>, supra. The statute before the court for interpretation required that

"All nominations for office * * * shall be filed not more than sixty (60) days and not less than thirty (30) days prior to the day of election * * *."

15 Wash.2d at page 151, 130 P.2d at page 73.

November 3, 1942, was election day. Excluding the first day; November 3, as required by Rem.Rev.Stat., § 150 (now RCW 1.12.040, supra), and counting backwards, the thirtieth day fell on Sunday, October 4. The candidate attempted to file his declaration with the secretary of the port commission at 4:00 p. m. on Saturday, October 3. The office closed at noon on Saturdays, a custom established over a period of ten years. On the authority of State ex rel. McQuesten v. Hinkle, 1924, 130 Wash. 525, 228 P. 299, this court held that the tender to file was not timely

made on Saturday afternoon.

The candidate then tendered his declaration of candidacy on Monday, October 5. This court sustained the refusal to accept the tendered declaration of candidacy, saying

"* * where a statute requires the filing of a petition to be accomplished not less than a certain number of days before the date of election, the fact that the last day falls on Sunday does not permit the filing to be made on the following business day. [Citing authorities.]

'It seems apparent that the primary purpose of the statute requiring nominations to be filed not less than thirty days before the election is to give notice, for that period of time, to the election officials and to the public of the identity *32 of the candidates. Such statutory provisions are generally regarded as mandatory. 29 C.J.S. Elections, § 137, p. 206; annotation, 72 A.L.R. 290. The author of the annotation just cited expressed therein the following conclusion, at page 290 of 72 A.L.R.:

"It is generally and almost universally held that statutory provisions in election statutes, requiring that a certificate or application of nomination be filed with a specified officer within a stipulated period of time, are mandatory."

'If we should hold contrary to the authorities above cited that, the thirtieth day falling on Sunday, Mr. Martin should have the next day, Monday, in which to file, then his filing would be on the twenty-ninth day preceding the election; and the mandatory provision of the statute that the filing must be accomplished *not less than thirty days* before election would be violated.' 15 Wash.2d at page 154, 130 P.2d at page 74.

The Earley case was decided in 1942. <u>RCW 29.18.030</u> was passed by the legislature in 1947. We assume, when it adopted the second portion of the statute, that it was cognizant of <u>RCW 1.12.040</u> and of this court's decision that, when the forty-fifth day prior to the primary election (counting backwards) fell on Sunday, declarations of candidacy could not be filed on the following Monday.

The first portion of <u>RCW 29.18.030</u>, supra, is clear and unambiguous. It fixes a definite date-not 'later than the preceding July 20th.' This does not require the computation of time; hence, <u>RCW 1.12.040</u> is not applicable.

[1] Our conclusion that RCW 29.18.030, supra, is a mandatory statute is supported by the text and authorities cited in 3 Sutherland, Statutory Construction, 3d Ed., § 5818, p. 109, wherein it is said:

**320 'A rule for determining whether a statute is mandatory or directory has even been formulated in terms of the stated consequences as the test. 'If [statutes are] mandatory, in addition to requiring the doing of the things specified, they prescribe the result that will follow if

they are not done; if directory, their terms are limited to what is required to be done."

This conclusion dovetails with the court's decision in State ex rel. Earley v. Batchelor, supra.

It does not follow, however, that the trial court should be reversed, with instructions to eliminate Mr. Vander Stoep's *33 name from the ballot in the general election to be held November 4, 1958.

The record before us does not disclose how many aspirants for public office filed their declarations of candidacy on Monday, July 21, 1958; nor does it disclose how many of them were actually nominated in the state primary election of September 9.

It would appear that a statutory means exists to assure the appearance of the names of candidates for *partisan* political office, successful in the primary election, who filed their declaration of candidacy on July 21. The county or state central committees (whichever is appropriate) of the respective political parties may, 'within thirty days after the primary,' fill vacancies on their tickets. RCW 29.18.150. This possibility is not available in the instant case, however, for the office of justice of the peace is a nonpartisan, judicial office within the meaning of RCW (1955 Sup.) 29.21.180; hence, if the trial court is reversed, the name of Mr. Vander Stoep's opponent will appear unopposed on the general election ballot.

[2] The touchstone for the instant case is the statutory official state election calendar, prepared by the secretary of state after advice from the state attorney general. It was given wide publicity; it was the official pronouncement of the state's chief election officer by which election officials and aspirants for office governed themselves. Mr. Vander Stoep as a potential candidate and respondent as county auditor had a right to rely thereon.

In a similar situation, the Supreme Court of Missouri said in an *En Banc* opinion:

'The respondent contends June 4 and not June 5 was the last day for filing. We do not need to inquire into the matter further than to say that, in any event, we are in agreement with the conclusion of the Special Commissioner that 'relators can not be deprived of their right to file any time during June 5, 1942, because of the opinion of the Attornay General of the State of Missouri rendered to the Secretary of State for the purpose of informing prospective candidates of the final filing date for the August 4, 1942, primary election, which said opinion recites: 'that June 5, *34 1942, is the last day for a candidate to file his declaration for candidacy.' See In re Bayne, supra, [69 Misc. 579, 127 N.Y.S. 915]. The relators had a right to rely upon the date as determined by the Attorney General.' (Italics ours.)

State ex rel. Huse v. Hayden, 1942, 349 Mo. 982, 163 S.W.2d 946, 948.

In <u>Clegg v. Bennion</u>, 1952, 122 <u>Utah 188</u>, 247 <u>P.2d 614</u>, 616, the court conceded that the statute that fixed the date for aspirants to file their declarations of candidacy was mandatory. The secretary of state had announced and given state-wide publicity to the fact that July 12 was the

final day for filing. He was in error; July 11 was the correct date. The court, however, sustained the validity of filings made on July 12 saying:

'We hold under the facts of this case that defendant Dalton was legally excused from filing the day before he did so. The authorities almost without exception sustain our position in similar instances. [fn. 'Mihlbaugh v. Bogart, 73 Ohio App. 47, 53 N.E.2d 75; In re Bayne, 69 Misc. 579, 127 N.Y.S. 915; Huse v. Haden, 349 Mo. 982, 163 S.W.2d 946; **321People v. Ham, 56 Misc. 112, 106 N.Y.S. 312; State v. Harris, 115 Fla. 3, 155 So. 100; contra, State v. Marsh, 120 Neb. 287, 232 N.W. 99, 72 A.L.R. 285.'] The tone of those decisions echoes in the strikingly similar Mihlbaugh case, where, under a statute like ours, a declarant was excused from filing on time because, among other things, the Board of Elections had announced that a certain date (too late) would be a timely filing date, which announcement was given wide publicity in the press, and the late filers relied thereon.

'If an error was committed by the Secretary of State in representing that July 12 was the deadline, followed by widespread publicity, the record nevertheless indicates that he and those relying on him acted in good faith. There is no evidence that filing on July 12 injured anyone as a practical matter.'

To the same effect is <u>In re Application of Zichello</u>, <u>Sup.</u>, <u>50 N.Y.S.2d 48</u>.

The election procedure for filing declarations of candidacy has been uniform throughout the state. All candidates had an equal time in which to file their declarations. No candidate has been favored over another. No one has been injured*35 nor put to additional expense. There is ample time for the secretary of state to make his certification of nominees. Mr. Vander Stoep's opponent is deprived of nothing save the fact that he will not be given an election by default.

As the circumstances demand prompt disposition of the case, the cherk is directed to send down the remittitur forthwith upon the filing of this opinion.

The judgment is affirmed.

DONWORTH, FINLEY, ROSELLINI, and FOSTER, JJ., concur. HILL, C. J., and MALLERY, J., dissent. OTT and HUNTER, JJ., not participating. WASH. 1958
Donohoe v. Shearer
53 Wash.2d 27, 330 P.2d 316

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Supreme Court of Washington. EDWARDS

v.

HUTCHINSON, Secretary of State. **No. 25247.**

Aug. 25, 1934.

En Banc.

Appeal from Superior Court, Thurston County; D. F. Wright, Judge.

Action by Robert R. Edwards against Ernest N. Hutchinson, as Secretary of State of the State of Washington. From a judgment dismissing the action, plaintiff appeals.

Affirmed.

West Headnotes

[1] Statutes 361 \$\iii 304\$

361 Statutes

361IX Initiative

361k304 k. Petition in General and Preliminary Steps. Most Cited Cases

(Formerly 361k351/2)

Statutory law relating to submission of initiative measures is concerned only with requisite number of signatures of legal voters and provides for review by courts of that question only, and legislative purposes is that if proposed measure meets test as to legal signatures it should be submitted to voters. Rem.Rev.Stats. §§ 5408, 5409, 5411, 5413-5415.

[2] Statutes 361 \$\infty\$ 315

361 Statutes

361IX Initiative

<u>361k315</u> k. Determination of Sufficiency and Certification Thereof. <u>Most Cited Cases</u> (Formerly 361k351/2)

Where secretary of state had not yet made official determination as to signatures of legal voters upon petition for initiative measure, question whether measure had requisite number of signatures of legal voters was not before court and could still be reviewed, as statute permitted, when secretary acted. Rem.Rev.Stat. § 5409.

[3] Statutes 361 \$\infty\$=309

361 Statutes

361IX Initiative

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361k309 k. Signers. Most Cited Cases (Formerly 361k351/2)
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Signatures of legal voters to petition for an initiative measure, although secured by paid workers who in soliciting for pay were violating law and were guilty of misdemeanor and liable to penalties, were valid and must be counted. Rem.Rev.Stat. § 5428.

[4] Statutes 361 \$\iii 309\$

361 Statutes

361IX Initiative

361k309 k. Signers. Most Cited Cases

(Formerly 361k351/2)

In action to enjoin secretary of state from canvassing names signed to initiative petition, already filed, and certifying measure for submission to voters, court could not undertake to interfere with action of electors merely upon theory that voters had been deceived into signing petition.

[5] Statutes 361 € 309

361 Statutes

361IX Initiative

361k309 k. Signers. Most Cited Cases

(Formerly 361k351/2)

Sponsor of petition for initiative measure was not agent of any of signers to extent that his offenses would bind signers or invalidate their signatures.

*580 **90 James P. Neal, of Olympia, for appellant.

Allen, Froude & Hilen, of Seattle, for intervener Halferty.

Welts & Welts, of Mt. Vernon, for intervener Anderson and others.

Theodore B. Bruener and Thomas S. Grant, both of Aberdeen, for interveners Flick and others.

Welsh & Welsh, of South Bend, for intervener Hobi.

G. W. Hamilton, Atty. Gen., and E. P. Donnelly and W. A. Toner, Asst. Attys. Gen., for respondent Hutchinson.

Bogle, Bogle & Gates, Stanley B. Long, and John F. Dore, all of Seattle, for respondent Orvis.

TOLMAN, Justice.

Robert R. Edwards, the plaintiff below, has appealed from a judgment dismissing his action*581 after the sustaining of a demurrer to his complaint had his refusal to amend. The question before us is whether or not the complaint states a cause of action.

By his complaint the appellant alleges that he is a citizen and taxpayer of this state and a fisherman by occupation duly licensed as such, and that he will suffer direct, special, and pecuniary injury, peculiar to himself and those similarly situated, differing from that suffered by the general public, if the proposed initiative measure, No. 77, is enacted into law, which is entitled: 'An Act relating to fishing; prohibiting the use of fish traps or other fixed appliances for catching salmon and certain other fish within the waters of the state of Washington; prohibiting the taking or fishing for salmon and certain other fish within a certain area therein defined and created, by any means except by trolling, regulating trolling in such area, and permitting the operation of gill nets therein under certain conditions; providing for open and closed seasons; prohibiting drag seines and limiting the length of gill nets in the Columbia River; prescribing penalties; and repealing all laws in conflict therewith.'

By this action he seeks to enjoin the secretary of state from canvassing the names signed to the initiative petition, already filed, and certifying the measure for submission to the voters.

The grounds alleged for the purpose of showing a right to injunctive relief are, speaking generally, that corrupt and fraudulent practices have been indulged in pursuant to a conspiracy by the proponents of the initiative measure, by means of which they have deceived and deluded many persons into **91 signing the petition without their knowing the nature of the proposed measure and all in direct violation of the law and of the public policy of this state. In detail, it is charged that solicitors were hired for the purpose of circulating*582 the petitions and were paid a cash consideration and other gratuity and rewards therefor and to conceal the wrong that such hired solicitors have filed affidavits containing false and fraudulent statements to the effect that no pay had been received by them. It is further charged that pursuant to the same conspiracy, and with the same intent and purpose, the warning which the law requires to be placed at the top of each sheet of an initiative petition has in many instances been covered up and concealed, the title to the proposed act has not been displayed as the law requires, and that the purported statement of expenditures filed with the secretary of state is false and fraudulent in that it omits, denies, or conceals the receipt of contributions and the names and addresses of many persons who contributed money and the names and addresses of persons to whom money has been paid, all in direct violation of the statutory law.

Further, it is charged that the proponents of the initiative measure have knowingly caused grossly false misstatements of facts to be published in the newspapers and in advertisements, bills, circulars, and cards, all for the purpose of deceiving the public and in an attempt to fraudulently induce voters to sign the initiative petition, and that except for these unlawful, dishonest, fraudulent, and deceptive practices sufficient signatures could not have been obtained to the initiative petition.

It is further alleged that these petitions have been filed with the secretary of state and that he will proceed to canvass and check the signatures thereto at great expense to the taxpayers, and that in doing so he will act without knowledge of the fraud inherent in the petitions or of the illegality of the methods used in procuring signatures, and therefore an emergency exists requiring the intervention of a court of equity.

*583 To this complaint a demurrer was interposed; but apparently before it was argued or disposed of a number of interested parties were, by the court, permitted to intervene, many of them having an interest common with the appellant, and their complaints in intervention are, speaking generally, along the same line. Others, who were permitted to intervene, took a position antagonistic to that of the appellant and demurred to his complaint.

It will be observed that prior to the bringing of this action the petition had been filed with the secretary of state, and that the appellant seeks only to enjoin the canvassing of the signatures and the certifying of the measure.

The chief reasons urged in support of the judgment of the trial court are based upon the statute.

[1] Rem. Rev. Stat. § 5408, requires the secretary of state, in the event that the petition bears the requisite number of signatures of legal voters, to accept and file it; otherwise, to reject it. If such a petition be rejected, a review by the courts is authorized by section 5409, but the statute gives no right to review the act of accepting and filing the petition.

By sections 5411, 5414, and 5415, Rem. Rev. Stat., it is made the duty of the secretary of state, after such filing, to canvass and count the names of the certified legal voters upon such petition, and if it bears the requisite number, to certify the measure to be placed on the ballot.

Section 5413 provides that any citizen dissatisfied with the determination of the secretary of state as to the requisite number of legal signatures may apply to the courts for a review. Hence, it appears that the statute law, so far as it relates to a submission of the measure, is concerned only with the requisite number *584 of signatures of legal voters and provides for a review by the courts of that question only.

Very plainly it was the legislative purpose that the proposed measure, if it meets the test as to legal signatures, shall be submitted to the voters.

[2] Since the secretary of state has not yet made his official determination as to the signatures of legal voters upon the petition under attack, that question is not before us in this case and may still be reviewed, as the statute permits, when the secretary of state shall have acted.

Appellant earnestly urges that the extraordinary equitable powers of the court should be exercised to the end that popular government be rescued from the slough into which it has fallen through the machinations of selfish interests, but much as we sympathize with that viewpoint and deprecate the use of methods such as are here charged, we see no possibility of granting the desired relief without disregarding all precedent and usurping political powers which have never yet been granted to or assumed by the courts.

**92 [3] The charges reduced to simple terms are but two. One, that paid workers have secured the signatures of legal voters. The law forbids the employment of paid workers, Rem. Rev. Stat. § 5428, makes it a criminal offense to hire or be hired for that purpose, but nowhere in the statute do we find a word or a line which invalidates the signature of a legal voter because it was

obtained by the solicitation of a paid worker. Hence, notwithstanding the fact that the paid worker has violated the law, is guilty of a misdemeanor and liable to the penalties provided for such an offense, yet, still the fact remains that a legal voter has signed the petition and his signature must be counted.

[4] The second charge is that in various ways the *585 voters have been deceived. Perhaps a legislative assembly, which is the judge of the qualifications of its own members, might take cognizance of such a charge, but if the courts were to assume jurisdiction over such matters they would find themselves busy indeed.

Ever since popular elections were instituted, in every one held, some one, perhaps many voters, have been deceived, and so long as the political field remains free and open, as it should and must if we are to have free popular government, there is no way to prevent prejudices being appealed to, and voters to a greater or less degree will always be deceived.

Manifestly the courts cannot undertake to set aside elections or to interfere with the action of electors upon the theory that some one has been deceived. Attempts to deceive can only be met by publicity and a campaign of education. The courts are powerless, or, if not powerless, an attempt to exercise power would result in confusion worse confounded. These views, we think, are supported by the great weight of authority.

The principle here involved has been before this court in other cases. In State ex rel. Harris v. Hinkle, 130 Wash. 419, 227 P. 861, 865, it is said: 'An examination of the petition filed with respondent to ascertain if it is in proper form for filing, complying with the formalities of the law as to its form and contents, and to ascertain if it has a sufficient number of signatures on the face of the petition to entitle it to be filed, involve administrative acts and matters of discretion. As to them this court would not attempt to regulate the conduct of respondent by an extraordinary writ in advance of the act of the secretary, but would only attempt to rectify any erroneous, capricious, or arbitrary act after it had been made under the provisions of the law relating to appeals, or some of the extraordinary remedies provided in the law.'

*586 In State ex rel. Case v. Superior Court, 81 Wash. 623, 143 P. 461, 464, Ann. Cas. 1916B, 838, very similar questions were considered and it was there said: 'In approaching the question of the power of the secretary and of the courts in determining questions arising incidental to the submission of an initiative measure to the voters, it is to be remembered that we are dealing with a political, and not a judicial, question, except only in so far as there may be express statutory or written constitutional law making the question judicial.'

And again: 'However, the grounds of the decisions of the Secretary and of the superior court upon the question of the fraudulent signing of these names and the rejection thereof by them we regard as of no consequence whatever here, since we have arrived at the conclusion that neither the Secretary nor the superior court had any power to determine that these names were not the valid signatures of legal voters, that question having, by express provision of the law, been committed for decision to the specified local certifying officers, and there being no provision whatever in the law authorizing a review of their decision by the Secretary. He having no such

power of review, the superior court cannot have, in any event, in this proceeding, it being manifest, as we view the law, that it is the rulings and decisions of the Secretary on questions which are within his power to decide, and none other, that the courts are authorized to review.'

And still further:

'The penal provisions of this law are very severe; set forth in detail and with manifestly great care. They are directed to the signers of petitions, the certifying local officers, and even those who circulate petitions soliciting signatures thereon for pay. So far as safeguarding the operation of a law by severe and painstaking prescribed penal provisions is concerned, this law has been, we think it safe to say, seldom exceeded in this respect. * * *

'Surely these provisions*587 evidence an intent on the part of the Legislature to make them the only safeguards looking to the prevention of fraud, forgery, and corruption, in the exercise of this constitutional right by the people, except in so far as the Legislature has provided for correction of erronrous rulings and decisions by officers having to do with the execution of the law. The question being inherently political, the Legislature had **93 the right and evidently intended to provide these penal provisions as the sole safeguards for the proper operation of the law, except wherein it has specifically provided other safeguards.'

[5] The rule thus announced was approved and followed in <u>State ex rel. Evans v. Superior Court, 168 Wash. 176, 11 P.(2d) 229.</u> In <u>State ex rel. Howell v. Superior Court, 97 Wash. 569, 166 P. 1126,</u> this court laid down the rule that the sponsor of such a petition was not the agent of any of the signers to the extent that his offenses would bind the signers or invalidate their signatures.

Appellants seem to rely upon language used in the cases of <u>State ex rel. Berry v. Superior Court</u>, <u>92 Wash. 16, 159 P. 92</u>; <u>Gibson v. Campbell, 136 Wash. 467, 241 P. 21</u>; <u>McCush v. Pratt, 113 Wash. 7, 192 P. 964</u>, and <u>State ex rel. McCauley v. Gilliam, 81 Wash. 186, 142 P. 470</u>, but these were all cases regularly brought under the provisions of the statute, and, as we see it, nothing said in any of those cases bears upon the present question.

Others of our cases are cited and discussed, but none has a sufficient bearing to warrant analysis or to call for a pointing out of distinguishing features. Some authorities from other jurisdictions are also cited by each of the parties hereto, but a study of these reveals nothing sufficiently in point to warrant a discussion which could have no clarifying effect.

*588 The demurrers were properly sustained, and the judgment appealed from is affirmed.

BEALS, C. J., and MAIN, MITCHELL, HOLCOMB, MILLARD, GERAGHTY, BLAKE, and STEINERT, JJ., concur.

Wash. 1934 Edwards v. Hutchinson 178 Wash. 580, 35 P.2d 90

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Supreme Court of the United States March Fong EU, Secretary of State of California, et al., Appellants

v.

SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE, et al. **No. 87-1269.**

Argued Dec. 5, 1988. Decided Feb. 22, 1989.

Party central committees brought action challenging sections of California Election Code banning primary endorsements and imposing restrictions on internal policy governance of political parties. The United States District Court for the Northern District of California, Marilyn H. Patel, J., entered judgment for committees, and appeal was taken. The Court of Appeals, 792 F.2d 802, affirmed. On appeal, the United States Supreme Court, 479 U.S. 1024, 107 S.Ct. 864, 93 L.Ed.2d 820, vacated and remanded. On remand, the Court of Appeals, Norris, Circuit Judge, 826 F.2d 814, again affirmed. On appeal, the Supreme Court, Justice Marshall held that: (1) ban on primary endorsements violated First and Fourteenth Amendments, and (2) restrictions on organization and composition of official governing bodies of political parties, limits on term of office for state central committee chairs, and requirement that such chairs rotate between residents of Northern and Southern California could not be upheld.

Affirmed.

Chief Justice Rehnquist took no part in consideration or decision of case.

Justice Stevens filed concurring opinion.

West Headnotes

[1] Constitutional Law 92 1465

92 Constitutional Law

92XVII Political Rights and Discrimination 92k1465 k. Political Parties in General. Most Cited Cases (Formerly 92k1460, 92k82(8))

Constitutional Law 92 \$\infty\$ 4231

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)9 Elections, Voting, and Political Rights

92k4231 k. Political Parties and Organizations. Most Cited Cases

(Formerly 92k82(8))

Elections 144 © 9

144 Elections

144I Right of Suffrage and Regulation Thereof in General
 144k8 Statutory Provisions Conferring or Defining Right
 144k9 k. Constitutionality and Validity. Most Cited Cases
 (Formerly 92k82(8))

To assess constitutionality of state election law, Supreme Court first examines whether it burdens rights protected by First and Fourteenth Amendments; if challenged law burdens rights of political parties and their members, it can survive constitutional scrutiny only if state shows that it advances compelling state interest and is narrowly tailored to serve that interest. <u>U.S.C.A.</u> Const.Amends. 1, 14.

[2] Constitutional Law 92 \$\iins\$1689

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
92XVIII(F) Politics and Elections
92k1689 k. Nominations; Primary Elections. Most Cited Cases
(Formerly 92k90.1(1.2))

Elections 144 \$\infty\$ 21

144 Elections

144I Right of Suffrage and Regulation Thereof in General
144k20 Power to Regulate Nominations and Ballots
144k21 k. In General. Most Cited Cases

California's ban on primary endorsements constituted violation of First Amendment right to free speech; ban prevents party governing bodies from stating whether candidate adheres to tenets of party or whether party officials believe that candidate is qualified for position sought, which directly hampers ability of party to spread its message and hamstrings voters seeking to inform themselves about candidates and campaign issues. West's Ann.Cal.Elec.Code §§ 11702, 29430; U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 \$\infty\$1465

92 Constitutional Law

92XVII Political Rights and Discrimination92k1465 k. Political Parties in General. Most Cited Cases(Formerly 92k91)

Freedom of association guaranteed under First Amendment means not only that individual voter has right to associate with political party of her choice, but also that political party has right to identify people who constitute association and to select standard bearer who best represents party's ideologies and preferences. <u>U.S.C.A. Const.Amend. 1</u>.

[4] Constitutional Law 92 \$\iiin\$1465

92 Constitutional Law

92XVII Political Rights and Discrimination92k1465 k. Political Parties in General. Most Cited Cases

(Formerly 92k91)

Parties and political organizations enjoy freedom of association protected by First and Fourteenth Amendments. U.S.C.A. Const.Amends. 1, 14.

[5] Constitutional Law 92 5 1465

92 Constitutional Law

92XVII Political Rights and Discrimination 92k1465 k. Political Parties in General. Most Cited Cases (Formerly 92k82(8))

Elections 144 © 21

144 Elections

<u>144I</u> Right of Suffrage and Regulation Thereof in General 144k20 Power to Regulate Nominations and Ballots

144k21 k. In General. Most Cited Cases

California statute which deprived political party of power to endorse candidates violated right of freedom of association as guaranteed under First Amendment; endorsement ban prevented parties from promoting candidates at crucial juncture at which appeal to common principles may be translated into concerted action and hence to political power in community. West's Ann.Cal.Elec.Code §§ 11702, 29430; U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 2 1468

92 Constitutional Law

92XVII Political Rights and Discrimination92k1468 k. Nominations; Primary Elections. Most Cited Cases(Formerly 92k91)

Constitutional Law 92 5 1689

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press
 92XVIII(F) Politics and Elections
 92k1689 k. Nominations; Primary Elections. Most Cited Cases
 (Formerly 92k90.1(1.2))

Elections 144 © 21

144 Elections

144I Right of Suffrage and Regulation Thereof in General
 144k20 Power to Regulate Nominations and Ballots
 144k21 k. In General. Most Cited Cases

In constitutional challenge to California statute banning primary endorsements, statute burdening rights to free speech and free association could survive constitutional scrutiny only if it served compelling governmental interest. <u>U.S.C.A. Const.Amend. 1</u>; <u>West's Ann.Cal.Elec.Code §§ 11702</u>, 29430.

[7] Elections 144 \$\infty\$=21

144 Elections

<u>144I</u> Right of Suffrage and Regulation Thereof in General 144k20 Power to Regulate Nominations and Ballots

144k21 k. In General. Most Cited Cases

In constitutional challenge to California's ban on primary endorsements, state was not relieved from showing endorsement ban served compelling state interest on basis that legislatures who could repeal ban belonged to political parties, that bylaws of some parties prohibited primary endorsements, and that parties continued to participate in state-run primaries; in supporting endorsement ban, individual legislator may be acting on her understanding of public good or her interest in reelection rather than as representative of party interests, not all parties have significant representation in legislature, and fact that parties continued to participate in state-run primary process did not indicate that they favored such regulation imposed upon that process. West's Ann.Cal.Elec.Code §§ 11702, 29430.

[8] Elections 144 \$\infty\$=21

144 Elections

144I Right of Suffrage and Regulation Thereof in General
 144k20 Power to Regulate Nominations and Ballots
 144k21 k. In General. Most Cited Cases

State may not enact election laws to mitigate intraparty factionalism during primary campaign; primary is not hostile to intraparty feuds but rather is ideal forum in which to resolve them.

[9] Constitutional Law 92 1465

92 Constitutional Law

92XVII Political Rights and Discrimination92k1465 k. Political Parties in General. Most Cited Cases(Formerly 92k82(8))

Preserving party unity during primary is not compelling state interest so as to justify infringement on First Amendment rights by statutory ban on primary endorsements; even if ban on endorsements saves political party from pursuing self-destructive acts, such does not justify state's substitution of its judgment for that of party. <u>U.S.C.A. Const.Amend. 1</u>; <u>West's Ann.Cal.Elec.Code §§ 11702</u>, 29430.

[10] Elections 144 © 21

144 Elections

144I Right of Suffrage and Regulation Thereof in General

144k20 Power to Regulate Nominations and Ballots

144k21 k. In General. Most Cited Cases

California's ban on party primary endorsements did not serve state's legitimate interest in fostering informed electorate; state made no showing that voters were unduly influenced by party endorsements or that endorsement issued by official party organization carried more weight than one issued by newspaper or labor union. West's Ann.Cal.Elec.Code §§ 11702, 29430; U.S.C.A. Const.Amends. 1, 14.

[11] Constitutional Law 92 5 1465

92 Constitutional Law

92XVII Political Rights and Discrimination

92k1465 k. Political Parties in General. Most Cited Cases

(Formerly 92k91)

Freedom of association as protected by First Amendment encompasses political party's decisions about identity of and process for electing its leaders. <u>U.S.C.A. Const.Amend. 1</u>.

[12] Constitutional Law 92 \$\iiins 1465\$

92 Constitutional Law

92XVII Political Rights and Discrimination

92k1465 k. Political Parties in General. Most Cited Cases

(Formerly 92k91)

Statutory restrictions on internal policy governance of political parties infringes upon party's right to free association; restrictions limited political party's discretion in how to organize itself, conduct it affairs, and select its officers. <u>U.S.C.A. Const.Amend. 1</u>; <u>West's Ann.Cal.Elec.Code § 1 et seq.</u>

[13] Elections 144 © 21

144 Elections

144I Right of Suffrage and Regulation Thereof in General

144k20 Power to Regulate Nominations and Ballots

144k21 k. In General. Most Cited Cases

State has compelling interest in preserving integrity of its election process and toward that end, may enact laws interfering with party's internal affairs when necessary to ensure that elections are fair and honest.

[14] Constitutional Law 92 \$\infty\$1465

92 Constitutional Law

92XVII Political Rights and Discrimination 92k1465 k. Political Parties in General. Most Cited Cases (Formerly 92k82(6.1), 92k82(6))

Elections 144 \$\infty\$ 21

144 Elections

144I Right of Suffrage and Regulation Thereof in General
 144k20 Power to Regulate Nominations and Ballots
 144k21 k. In General. Most Cited Cases

California's statutory restrictions on internal policy governance of political parties which infringed upon First Amendment rights did not serve compelling state interest and thus could not be upheld; state failed to demonstrate that such regulation was necessary to ensure election that was orderly and fair. <u>U.S.C.A. Const.Amends. 1</u>, 14; <u>West's Ann.Cal.Elec.Code § 1 et seq.</u>

**1015 *214 Syllabus FN*

<u>FN*</u> The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See <u>United States v. Detroit Lumber Co.</u>, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Section 11702 of the California Elections Code (Code) forbids the official governing bodies of political parties to endorse or oppose candidates in primary elections, while § 29430 makes it a misdemeanor for any candidate in a primary to claim official party endorsement. Other Code sections dictate the organization and composition of parties' governing bodies, limit the term of office for a party's state central committee chair, and require that the chair rotate between residents of northern and southern California. Various party governing bodies, members of such bodies, and other politically active groups and individuals brought suit in the District Court, claiming, *inter alia*, that these Code provisions deprived parties and their members of the rights of free speech and free association guaranteed by the First and Fourteenth Amendments. The District Court granted summary judgment for the plaintiffs as to the provisions in question, and the Court of Appeals affirmed.

Held: The challenged California election laws are invalid, since they burden the First Amendment rights of political parties and their members without serving a compelling state interest. Pp. 1019-1025.

(a) The ban on primary endorsements in §§ 11702 and 29430 violates the First and Fourteenth Amendments. By preventing a party's governing body from stating whether a candidate adheres to the party's tenets or whether party officials believe that the candidate is qualified for the position sought, the ban directly hampers the party's ability to spread its message and hamstrings voters seeking to inform themselves about the candidates and issues, and thereby burdens the core right to free political speech of the party and its members. The ban also infringes a party's protected freedom of association rights to identify the people who constitute the association and

to select a standard-bearer who best represents the party's ideology and preferences, by preventing the party from promoting candidates at the crucial primary election juncture. Moreover, the ban does not serve a compelling governmental interest. The State has not adequately explained how the ban advances its claimed interest in a stable political system or what makes California so peculiar that it is virtually the only State to determine that such a ban *215 is necessary. The explanation that the State's compelling interest in stable government embraces a similar interest in party stability is untenable, since a State may enact laws to prevent disruption of political parties from without but not from within. The claim that a party that issues primary endorsements risks intraparty friction which may endanger its general election prospects is insufficient, since the goal of protecting the party against itself would not justify a State's substituting its judgment for that of the party. The State's claim that the ban is necessary to protect primary voters from confusion and undue influence must be viewed with skepticism, since the ban restricts the flow of information to the citizenry without any evidence of the existence of fraud or corruption that would justify such a restriction. Pp. 1019-1023.

**1016 (b) The restrictions on the organization and composition of the official governing bodies of political parties, the limits on the term of office for state central committee chairs, and the requirement that such chairs rotate between residents of northern and southern California cannot be upheld. These laws directly burden the associational rights of a party and its members by limiting the party's discretion in how to organize itself, conduct its affairs, and select its leaders. Moreover, the laws do not serve a compelling state interest. A State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure that elections are orderly, fair, and honest, and California has made no such showing. The State's claim that it has a compelling interest in the democratic management of internal party affairs is without merit, since this is not a case where intervention is necessary to prevent the derogation of party adherents' civil rights, and since the State has no interest in protecting the party's integrity against the party itself. Nor are the restrictions justified by the State's claim that limiting the term of the state central committee chair and requiring that the chair rotate between northern and southern California help to prevent regional friction from reaching a critical mass, since a State cannot substitute its judgment for that of the party as to the desirability of a particular party structure. Pp. 1023-1025.

826 F.2d 814 (CA9 1987), affirmed.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined, except REHNQUIST, C.J., who took no part in the consideration or decision of the case. STEVENS, J., filed a concurring opinion, *post*, p. 1025.

Geoffrey L. Graybill, Jr., Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were John K. Van de Kamp, Attorney General, Richard*216 D. Martland, Chief Assistant Attorney General, and N. Eugene Hill, Assistant Attorney General.

James J. Brosnahan argued the cause for appellees. With him on the brief was Cedric C. Chao.*

^{*} Stuart R. Blatt filed a brief for the Libertarian National Committee as amicus curiae.

Justice MARSHALL delivered the opinion of the Court.

The California Elections Code prohibits the official governing bodies of political parties from endorsing candidates in party primaries. It also dictates the organization and composition of those bodies, limits the term of office of a party chair, and requires that the chair rotate between residents of northern and southern California. The Court of Appeals for the Ninth Circuit held that these provisions violate the free speech and associational rights of political parties and their members guaranteed by the First and Fourteenth Amendments. 826 F.2d 814 (1987). We noted probable jurisdiction, 485 U.S. 1004, 108 S.Ct. 1466, 99 L.Ed.2d 696 (1988), and now affirm.

I

A

The State of California heavily regulates its political parties. Although the laws vary in extent and detail from party to party, certain requirements apply to all "ballot-qualified" parties. FN1 The California Elections Code (Code) provides that the "official governing bodies" for such a party are its "state convention," "state central committee," and "county central committees," Cal.Elec.Code Ann. § 11702 (West *217 1977), and that these bodies are responsible for conducting the party's campaigns. At the same time, the Code provides**1017 that the official governing bodies "shall not endorse, support, or oppose, any candidate for nomination by that party for partisan office in the direct primary election." *Ibid.* It is a misdemeanor for any primary candidate, or a person on her behalf, to claim that she is the officially endorsed candidate of the party. § 29430.

<u>FN1.</u> A "ballot-qualified" party is eligible to participate in any primary election because: (a) during the last gubernatorial election one of its candidates for state-wide office received two percent of the vote; (b) one percent of the State's voters are registered with the party; or (c) a petition establishing the party has been filed by ten percent of the State's voters. Cal.Elec.Code Ann. § 6430 (West 1977).

In the interest of simplicity, we use the terms "ballot-qualified party" and "political party" interchangeably.

FN2. The Code requires the state central committee of each party to conduct campaigns for the party, employ campaign directors, and develop whatever campaign organizations serve the best interests of the party. Cal.Elec.Code Ann. § 8776 (West Supp.1989) (Democratic Party); § 9276 (Republican Party); § 9688 (American Independent Party); § 9819 (Peace and Freedom Party). The county central committees, in turn, "have charge of the party campaign under general direction of the state central committee." § 8940 (Democratic Party); § 9440 (Republican Party); § 9740 (American Independent Party); § 9850 (Peace and Freedom Party). In addition, they "perform such other duties and services for th[e] political party as seem to be for the benefit of the party." § 8942 (Democratic Party); § 9443 (Republican Party); § 9742 (American Independent Party); § 9852 (Peace and Freedom Party).

Although the official governing bodies of political parties are barred from issuing endorsements, other groups are not. Political clubs affiliated with a party, labor organizations, political action committees, other politically active associations, and newspapers frequently endorse primary candidates. With the official party organizations silenced by the ban, it has been possible for a candidate with views antithetical to those of her party nevertheless to win its primary.

<u>FN3.</u> For example, while voters cannot learn what the Democratic state and county central committees think of candidates, they may be flooded with endorsements from disparate groups across the State such as the Berkeley Democratic Club, the Muleskinners Democratic Club, and the District 8 Democratic Club. Addendum to Motion to Affirm or to Dismiss 39a ¶ 7 (Addendum) (declaration of Mary King, chair of the Alameda County Democratic Central Committee); Addendum 48 ¶ 7 (declaration of Linda Post, chair of San Francisco County Democratic Central Committee).

<u>FN4.</u> In 1980, for example, Tom Metzger won the Democratic Party's nomination for United States House of Representative from the San Diego area, although he was a Grand Dragon of the Ku Klux Klan and held views antithetical to those of the Democratic Party. Addendum 15a ¶ 2 (declaration of Edmond Costantini, member of the Executive Board of the Democratic state central committee).

*218 In addition to restricting the primary activities of the official governing bodies of political parties, California also regulates their internal affairs. Separate statutory provisions dictate the size and composition of the state central committees; FN5 set forth rules governing the selection and removal of committee members; FN6 fix the maximum term of office for the chair of the state central committee; FN7 require that the chair rotate between residents of northern and southern California; FN8 specify the time and place of committee meetings; FN9 and *219 limit **1018 the dues parties may impose on members. Violations of these provisions are criminal offenses punishable by fine and imprisonment.

FN5. For example, the Code dictates the precise mix of elected officials, party nominees, and party activists who are members of the state central committees of the Republican and Democratic Parties as well as who may nominate the various committee members. Cal.Elec.Code Ann. §§ 8660, 8661, 8663 (West 1977 and Supp.1989) (Democratic Party); §§ 9160-9164 (Republican Party). Other parties are similarly regulated. See § 9640 (American Independent Party); §§ 9762, 9765 (Peace and Freedom Party).

<u>FN6.</u> §§ 8663-8667, 8669 (Democratic Party); §§ 9161-9164, 9168, 9170 (Republican Party); §§ 9641-9644, 9648-9650 (West 1977) (American Independent Party); §§ 9790-9794 (West 1977 and Supp.1989) (Peace and Freedom Party).

FN7. The Code limits the term of office of the chair of the state central committee to two years and prohibits successive terms. See § 8774 (West Supp.1989) (Democratic Party); § 9274 (West 1977) (Republican Party); § 9685 (American Independent Party); § 9816 (West 1977 and Supp.1989) (Peace and Freedom Party).

<u>FN8.</u> § 8774 (West Supp.1989) (Democratic state central committee); § 9274 (West 1977) (Republican state central committee); § 9816 (West 1977 and Supp.1989) (Peace and Freedom state central committee).

FN9. §§ 8710, 8711 (West Supp.1989) (Democratic state central committee); §§ 8920, 8921 (West 1977 and Supp.1989) (Democratic county central committee); § 9210 (West Supp.1989) (Republican state central committee); §§ 9420-9421 (West 1977 and Supp.1989) (Republican county central committee); §§ 9730-9732 (American Independent county central committee); § 9800 (West 1977) (Peace and Freedom state central committee); §§ 9830, 9840-9842 (Peace and Freedom county central committee).

<u>FN10.</u> §§ 8775, 8945 (West 1977 and Supp.1989) (Democratic Party); § 9275 (West 1977 and Supp.1989) (Republican Party); §§ 9687, 9745 (West 1977) (American Independent Party); §§ 9818, 9855 (Peace and Freedom Party).

В

Various county central committees of the Democratic and Republican Parties, the state central committee of the Libertarian Party, members of various state and county central committees, and other groups and individuals active in partisan politics in California brought this action in federal court against state officials responsible for enforcing the Code (State or California). FN11 They contended that the ban on primary endorsements and the restrictions on internal party governance deprive political parties and their members of the rights of free speech and free association guaranteed by the First and Fourteenth Amendments of the United States Constitution. The first count of the complaint challenged the ban on endorsements in partisan primary elections; the second count challenged the ban on endorsements in nonpartisan school, county, and municipal elections; and the third count challenged the provisions that prescribe the composition of state central committees, the term of office and eligibility criteria for state central committee chairs, the time and place of state and county central committee meetings, and the dues county committee members must pay.

<u>FN11.</u> The plaintiffs sued March Fong Eu, Secretary of State of California; John K. Van de Kamp, Attorney General of California; Arlo Smith, District Attorney of San Francisco County; and Leo Himmelsbach, District Attorney of Santa Clara County.

<u>FN12.</u> The plaintiffs also asserted that the statutes violated the Equal Protection Clause of the Fourteenth Amendment. Because the District Court held that the statutes violate the First Amendment, it did not reach this claim.

*220 The plaintiffs moved for summary judgment, in support of which they filed 28 declarations from the chairs of each plaintiff central committee, prominent political scientists, and elected officials from California and other States. The State moved to dismiss and filed a cross-motion for summary judgment supported by one declaration from a former state senator.

The District Court granted summary judgment for the plaintiffs on the first count, ruling that the ban on primary endorsements in §§ 11702 and 29430 violated the First Amendment as applied to the States through the Fourteenth Amendment. The court stayed all proceedings on the second count under the abstention doctrine of *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). On the third count, the court ruled that the laws prescribing the composition of state central committees, limiting the committee chairs' terms of office, and designating that the chair rotate between residents of northern and southern California violate the First Amendment. The court denied summary judgment**1019 with respect to the statutory provisions establishingthe *221 time and place of committee meetings and the amount of dues. Civ. No. C-83-5599 MHP (ND Cal., May 3, 1984).

FN13. An appeal was then pending in the California Supreme Court presenting a First Amendment challenge to a ban on endorsements by political parties of candidates in nonpartisan school, county, and municipal elections. The California Supreme Court ultimately decided that the Code did not prohibit such endorsements and so did not reach the First Amendment question. *Unger v. Superior Court*, 37 Cal.3d 612, 209 Cal.Rptr. 474, 692 P.2d 238 (1984). A ban on party endorsements in nonpartisan elections subsequently was enacted by ballot initiative. A Federal District Court has ruled that this ban violates the First and Fourteenth Amendments. *Geary v. Renne*, 708 F.Supp. 278 (ND Cal.), stayed, 856 F.2d 1456 (CA9 1988).

FN14. The District Court invalidated the following Code sections: Cal.Elec.Code §§ 8660, 8661, 8663-8667, 8669 (West 1977 and Supp.1989) (Democratic state central committee); §§ 9160, 9160.5, 9161, 9161.5, 9162-9164 (Republican state central committee); § 9274 (West 1977) (Republican state central committee chair); and § 9816 (West 1977 and Supp.1989) (Peace and Freedom state central committee chair). In addition, it held that § 29102 (West 1977) was unconstitutional as applied.

The Court of Appeals for the Ninth Circuit affirmed. <u>792 F.2d 802 (1986)</u>. This Court vacated that decision, <u>479 U.S. 1024</u>, <u>107 S.Ct. 864</u>, <u>93 L.Ed.2d 820 (1987)</u>, and remanded for further consideration in light of <u>Tashjian v. Republican Party of Connecticut</u>, <u>479 U.S. 208</u>, <u>107 S.Ct. 544</u>, <u>93 L.Ed.2d 514 (1986)</u>.

After supplemental briefing, the Court of Appeals again affirmed. 826 F.2d 814 (1987). The court first rejected the State's arguments based on nonjusticiability, lack of standing, Eleventh Amendment immunity, and *Pullman* abstention. 826 F.2d, at 821-825. Turning to the merits, the court characterized the prohibition on primary endorsements as an "outright ban" on political speech. *Id.*, at 833. "Prohibiting the governing body of a political party from supporting some candidates and opposing others patently infringes both the right of the party to express itself freely and the right of party members to an unrestricted flow of political information." *Id.*, at 835. The court rejected the State's argument that the ban served a compelling state interest in preventing internal party dissension and factionalism: "The government simply has no legitimate interest in protecting political parties from disruptions of their own making." *Id.*, at 834. The court noted, moreover, that the State had not shown that banning primary endorsements protects parties from factionalism. *Ibid.* The court concluded that the ban was not necessary to protect

voters from confusion, stating, "California's ban on preprimary endorsements is a form of paternalism that is inconsistent with the First Amendment." *Id.*, at 836.

The Court of Appeals also found that California's regulation of internal party affairs "burdens the parties' right to govern themselves as they think best." <u>Id.</u>, at 827. This interference with the parties' and their members' First Amendment rights was not justified by a compelling state interest, for a State has a legitimate interest "in orderly elections,*222 not orderly parties." <u>Id.</u>, at 831. In any event, the court noted, the State had failed to submit " 'a shred of evidence,' " <u>id.</u>, at 833 (quoting Civ. No. C-83-5599 (ND Cal. May 3, 1984)), that the regulations of party internal affairs helped minimize party factionalism. Accordingly, the court held that the challenged provisions were unconstitutional under the First and Fourteenth Amendments.

П

[1] A State's broad power to regulate the time, place, and manner of elections "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." *Tashjian v. Republican Party of Connecticut*, 479 U.S., at 217, 107 S.Ct., at 550. To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. *Id.*, at 214, 107 S.Ct., at 548; *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983). If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest, *Tashjian, supra*, 479 U.S., at 217, 222, 107 S.Ct., at 550, 552; *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 990, 59 L.Ed.2d 230 (1979); *American Party of Texas v. White*, 415 U.S. 767, 780, and n. 11, 94 S.Ct. 1296, 1305, and n. 11, 39 L.Ed.2d 744 (1974); *Williams v. Rhodes*, 393 U.S. 23, 31, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968), and is narrowly tailored to serve that interest, *Illinois Bd. of Elections, supra*, 440 U.S. at 185, 99 S.Ct. at 991; *Kusper v. Pontikes*, 414 U.S. 51, 58-59, 94 S.Ct. 303, 308, 38 L.Ed.2d 260 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 343, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274 (1972).

**1020 A

We first consider California's prohibition on primary endorsements by the official governing bodies of political parties. California concedes that its ban implicates the First Amendment, Tr. of Oral Arg. 17, but contends that the burden is "miniscule." *Id.*, at 7. We disagree. The ban directly affects speech which "is at the core of our electoral *223 process and of the First Amendment freedoms." *Williams v. Rhodes, supra,* 393 U.S., at 32, 89 S.Ct., at 11. We have recognized repeatedly that "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo,* 424 U.S. 1, 14, 96 S.Ct. 612, 632, 46 L.Ed.2d 659 (1976) (*per curiam*); see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 102 S.Ct. 3409, 3426, 73 L.Ed.2d 1215 (1982); *Carey v. Brown,* 447 U.S. 455, 467, 100 S.Ct. 2286, 2294, 65 L.Ed.2d 263 (1980); *Garrison v. Louisiana,* 379 U.S. 64, 74-75, 85 S.Ct. 209, 215-216, 13 L.Ed.2d 125 (1964). Indeed, the First Amendment "has its fullest and most urgent application" to speech uttered during a campaign for political office. *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971);

see also *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1436, 16 L.Ed.2d 484 (1966). Free discussion about candidates for public office is no less critical before a primary than before a general election. Cf. *Storer v. Brown*, 415 U.S. 724, 735, 94 S.Ct. 1274, 1281, 39 L.Ed.2d 714 (1974); *Smith v. Allwright*, 321 U.S. 649, 666, 64 S.Ct. 757, 766, 88 L.Ed. 987 (1944); *United States v. Classic*, 313 U.S. 299, 314, 61 S.Ct. 1031, 1037, 85 L.Ed.2d 1368 (1941). In both instances, the "election campaign is a means of disseminating ideas as well as attaining political office." *Illinois Bd. of Elections, supra*, 440 U.S. at 186, 99 S.Ct. at 991.

[2] California's ban on primary endorsements, however, prevents party governing bodies from stating whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought. This prohibition directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues. See *Tashjian, supra,* 479 U.S., at 220-222, 107 S.Ct., at 552; *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California,* 475 U.S. 1, 8, 106 S.Ct. 903, 907, 89 L.Ed.2d 1 (1986); *Brown v. Hartlage,* 456 U.S. 45, 60, 102 S.Ct. 1523, 1532, 71 L.Ed.2d 732 (1982); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 791-792, 98 S.Ct. 1407, 1423-1424, 55 L.Ed.2d 707 (1978). A "highly paternalistic approach" limiting what people may hear is generally suspect, *224 *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 770, 96 S.Ct. 1817, 1829, 48 L.Ed.2d 346 (1976); see also *First National Bank of Boston, supra,* 435 U.S., at 790-792, 98 S.Ct., at 1423-1424, but it is particularly egregious where the State censors the political speech a political party shares with its members. See *Roberts v. United States Jaycees,* 468 U.S. 609, 634, 104 S.Ct. 3244, 3258, 82 L.Ed.2d 462 (1984) (O'CONNOR, J., concurring).

[3][4] Barring political parties from endorsing and opposing candidates not only burdens their freedom of speech but also infringes upon their freedom of association. It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments. *Tashjian, supra,* 479 U.S. at 214, 107 S.Ct. at 548; see also *Elrod v. Burns,* 427 U.S. 347, 357, 96 S.Ct. 2673, 2681, 49 L.Ed.2d 547 (1976) (plurality opinion). Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, *Tashjian, supra,* 479 U.S., at 214, 107 S.Ct., at 548 (quoting *Kusper, supra,* 414 U.S., at 57, 94 S.Ct., at 307), but also that a political party has a right to "identify the people who constitute the association," *Tashjian, supra,* 479 U.S., at 214, 107 S.Ct., at 548 (quoting **1021Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 122, 101 S.Ct. 1010, 1019, 67 L.Ed.2d 82 (1981)); cf. *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460-462, 78 S.Ct. 1163, 1172, 2 L.Ed.2d 1488 (1958), and to select a "standard bearer who best represents the party's ideologies and preferences." *Ripon Society, Inc. v. National Republican Party,* 173 U.S.App.D.C. 350, 384, 525 F.2d 567, 601 (1975) (Tamm, J., concurring in result), cert. denied, 424 U.S. 933, 96 S.Ct. 1147, 47 L.Ed.2d 341 (1976).

[5] Depriving a political party of the power to endorse suffocates this right. The endorsement ban prevents parties from promoting candidates "at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." <u>Tashjian, supra, 479 U.S., at 216, 107 S.Ct., at 549.</u> Even though individual members of the state central committees and county central committees are free to issue

endorsements, imposing limitations*225 "on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association." <u>Citizens Against Rent Control/Coalition for Fair Housing v.</u> Berkeley, 454 U.S. 290, 296, 102 S.Ct. 434, 437, 70 L.Ed.2d 492 (1981).

[6][7] Because the ban burdens appellees' rights to free speech and free association, it can only survive constitutional scrutiny if it serves a compelling governmental interest. The *226 State offers two: stable government and protecting voters from confusion and undue influence. Maintaining**1022 a stable political system is, unquestionably, a compelling state interest. See *Storer v. Brown*, 415 U.S., at 736, 94 S.Ct., at 1282. California, however, never adequately explains how banning parties from endorsing or opposing primary candidates advances that interest. There is no showing, for example, that California's political system is any more stable now than it was in 1963, when the legislature enacted the ban. Nor does the State explain what makes the California system so peculiar that it is virtually the only State that has determined that such a ban is necessary. FN17

<u>FN15.</u> California contends that it need not show that its endorsement ban serves a compelling state interest because the political parties have "consented" to it. In support of this claim, California observes that the legislators who could repeal the ban belong to political parties, that the bylaws of some parties prohibit primary endorsements, and that parties continue to participate in state-run primaries.

This argument is fatally flawed in several respects. We have never held that a political party's consent will cure a statute that otherwise violates the First Amendment. Even aside from this fundamental defect, California's consent argument is contradicted by the simple fact that the official governing bodies of various political parties have joined this lawsuit. In addition, the Democratic and Libertarian Parties moved to issue endorsements following the Court of Appeals' invalidation of the endorsement ban.

There are other flaws in the State's argument. Simply because a legislator belongs to a political party does not make her at all times a representative of party interests. In supporting the endorsement ban, an individual legislator may be acting on her understanding of the public good or her interest in reelection. The independence of legislators from their parties is illustrated by the California Legislature's frequent refusal to amend the election laws in accordance with the wishes of political parties. See, e.g., Addendum 12a-13a ¶¶ 7-9 (declaration of Bert Coffey, chair of the Democratic state central committee). Moreover, the State's argument ignores those parties with negligible, if any, representation in the legislature.

That the bylaws of some parties prohibit party primary endorsements also does not prove consent. These parties may have chosen to reflect state election law in their bylaws, rather than permit or require conduct prohibited by law. Nor does the fact that parties continue to participate in the state-run primary process indicate that they favor each regulation imposed upon that process. A decision to participate in state-run primaries more likely reflects a party's determination that ballot participation is more

advantageous than the alternatives, that is, supporting independent candidates or conducting write-in campaigns. See *Storer v. Brown*, 415 U.S. 724, 745, 94 S.Ct. 1274, 1286, 39 L.Ed.2d 714 (1974); *Anderson v. Celebrezze*, 460 U.S. 780, 799, n. 26, 103 S.Ct. 1564, 1575, n. 26, 75 L.Ed.2d 547 (1983).

Finally, the State's focus on the parties' alleged consent ignores the independent First Amendment rights of the parties' members. It is wholly undemonstrated that the members authorized the parties to consent to infringements of members' rights.

FN16. The State also claims that the ban on primary endorsements serves a compelling state interest in "confining each voter to a single nominating act." Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 225, n. 13, 107 S.Ct. 544, 555, n. 13, 93 L.Ed.2d 514 (1986) (quoting Anderson, supra, 460 U.S., at 802, n. 29, 103 S.Ct. at 1576, n. 29). This argument is meritless. It fails to distinguish between a nominating act-the vote cast at the primary election-and speech that may influence that act. The logic of the State's argument not only would support a ban on endorsements by every organization and individual, but also would justify a total ban on all discussion of a candidate's qualifications and political positions. Such a blanket prohibition cannot coexist with the constitutional protection of political speech.

The State's claim that the endorsement ban is necessary to serve any compelling state interest is called into question by its argument before the District Court and the Court of Appeals that this action is not justiciable because the State has never enforced the challenged election laws. 826 F.2d 814, 821 (1987).

FN17. New Jersey also bans primary endorsements by political parties. N.J.Stat.Ann. § 19:34-52 (West 1964); see Weisburd, Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods, 57 S.Cal.L.Rev. 213, 271-272, n. 343 (1984). Florida's statutory ban on primary endorsements by political parties was held to violate the First Amendment. See Abrams v. Reno, 452 F.Supp. 1166, 1171-1172 (SD Fla.1978), aff'd, 649 F.2d 342 (CA5 1981), cert. denied, 455 U.S. 1016, 102 S.Ct. 1710, 72 L.Ed.2d 133 (1982). Several States provide formal procedures for party primary endorsements. See, e.g., Conn.Gen.Stat. § 9-390 (1967 and Supp.1988); R.I.Gen.Laws § 17-12-4 (1988); see also Advisory Commission on Intergovernmental Relations, The Transformation in American Politics: Implications for Federalism 148 (1986).

[8] *227 The only explanation the State offers is that its compelling interest in stable government embraces a similar interest in party stability. Brief for Appellants 47. The State relies heavily on *Storer v. Brown, supra,* where we stated that because "splintered parties and unrestrained factionalism may do significant damage to the fabric of government," 415 U.S., at 736, 94 S.Ct., at 1282, States may regulate elections to ensure that "some sort of order, rather than chaos ... accompan[ies] the democratic processes," *id.*, at 730, 94 S.Ct., at 1279. Our decision in *Storer*, however, does not stand for the proposition that a State may enact election laws to mitigate intraparty factionalism during a primary campaign. To the contrary, *Storer* recognized that

"contending forces within the party employ the primary campaign and the primary election to finally settle their differences." <u>Id.</u>, at 735, 94 S.Ct., at 1281. A primary is not hostile to intraparty feuds; rather it is an ideal forum in which to resolve them. *Ibid.; American Party of Texas v. White*, 415 U.S., at 781, 94 S.Ct., at 1306. *Tashjian* recognizes precisely this distinction. In that case, we noted that a State may enact laws to "prevent the disruption of the political parties from without" but not, as in this case, laws "to prevent the parties from taking internal steps affecting their own process for the selection of candidates." <u>479 U.S.</u>, at 224, 107 S.Ct., at 553.

[9] It is no answer to argue, as does the State, that a party that issues primary endorsements risks intraparty friction which may endanger the party's general election prospects. Presumably a party will be motivated by self-interest and not engage in acts or speech that run counter to its political success. However, even if a ban on endorsements saves a political party from pursuing self-destructive acts, that would *228 not justify a State substituting its judgment for that of the party. See *ibid.*; *Democratic Party of United States*, 450 U.S., at 124, 101 S.Ct., at 1020. Because preserving party unity during a primary is not a compelling state interest, we must look elsewhere to justify the challenged law.

[10] The State's second justification for the ban on party endorsements and statements of opposition is that it is necessary to protect primary voters from confusion and undue influence. Certainly the State **1023 has a legitimate interest in fostering an informed electorate. *Tashjian, supra,* 479 U.S., at 220, 107 S.Ct., at 551-552; *Anderson v. Celebrezze,* 460 U.S., at 796, 103 S.Ct., at 1573-1574; *American Party of Texas v. White, supra,* 415 U.S., at 782, n. 14, 94 S.Ct., at 1307; *Bullock v. Carter,* 405 U.S. 134, 145, 92 S.Ct. 849, 856-857, 31 L.Ed.2d 92 (1972); *Jenness v. Fortson,* 403 U.S. 431, 442, 91 S.Ct. 1970, 1976, 29 L.Ed.2d 554 (1971). However, "[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Tashjian, supra,* 479 U.S., at 221, 107 S.Ct., at 552 (quoting *Anderson v. Celebrezze, supra,* 460 U.S., at 798, 103 S.Ct., at 1575). While a State may regulate the *229 flow of information between political associations and their members when necessary to prevent fraud and corruption, see *Buckley v. Valeo,* 424 U.S., at 26-27, 96 S.Ct., at 638-639; *Jenness v. Fortson, supra,* 403 U.S., at 442, 91 S.Ct., at 1976, there is no evidence that California's ban on party primary endorsements serves that purpose. FN19

<u>FN18.</u> It is doubtful that the silencing of official party committees, alone among the various groups interested in the outcome of a primary election, is the key to protecting voters from confusion. Indeed, the growing number of endorsements by political organizations using the labels "Democratic" or "Republican" has likely misled voters into believing that the official governing bodies were supporting the candidates.

The State makes no showing, moreover, that voters are unduly influenced by party endorsements. There is no evidence that an endorsement issued by an official party organization carries more weight than one issued by a newspaper or a labor union. In States where parties are permitted to issue primary endorsements, voters may consider the parties' views on the candidates but still exercise independent judgment when

casting their vote. For example, in the 1982 New York Democratic gubernatorial contest, Mario Cuomo won the primary over Edward Koch, who had been endorsed by the party. That year gubernatorial candidates endorsed by their parties also lost the primary election to nonendorsed candidates in Massachusetts and Minnesota. Even where the party-endorsed candidate wins the primary, one study has concluded that the party endorsement has little, if any effect, on the way voters cast their vote. App. 97-98 ¶¶ 10, 14-17 (declaration of Malcolm E. Jewell, Professor of Political Science, University of Kentucky).

FN19. The State suggested at oral argument that the endorsement ban prevents fraud by barring party officials from misrepresenting that they speak for the party. To the extent that the State suggests that only the primary election results can constitute a party endorsement, Tr. of Oral Arg. 8-9, it confuses an endorsement from the official governing bodies that may influence election results with the results themselves. To the extent that the State is claiming that the appellees are not authorized to represent the official party governing bodies and their members, the State simply is reasserting its standing claim, which the District Court rejected. Civ. No. C-83-5599 (ND Cal., June 1, 1984) ("[T]he plaintiff central committees ... have authorization and capacity to bring and maintain this litigation"). The Court of Appeals did not disturb this ruling, 826 F.2d, at 822, n. 17; nor do we.

Because the ban on primary endorsements by political parties burdens political speech while serving no compelling governmental interest, we hold that <u>§§ 11702</u> and <u>29430</u> violate the First and Fourteenth Amendments.

В

[11] We turn next to California's restrictions on the organization and composition of official governing bodies, the limits on the term of office for state central committee chair, and the requirement that the chair rotate between residents of northern and southern California. These laws directly implicate the associational rights of political parties and their members. As we noted in *Tashjian*, a political party's "determination ... of the structure which best allows it to pursue its political goals, is protected by the Constitution." 479 U.S., at 224, 107 S.Ct., at 554. Freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders. See *Democratic Party of United States, supra* (State cannot dictate process of selecting state delegates to Democratic National **1024 Convention); *230 Cousins v. Wigoda, 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975) (State cannot dictate who may sit as state delegates to Democratic National Convention); cf. *Tashjian, supra*, 479 U.S., at 235-236, 107 S.Ct., at 559-560 (SCALIA, J., dissenting) ("The ability of the members of [a political p]arty to select their own candidate ... unquestionably implicates an associational freedom").

[12] The laws at issue burden these rights. By requiring parties to establish official governing bodies at the county level, California prevents the political parties from governing themselves with the structure they think best. FN20 And by specifying who shall be the members of the parties'

official governing bodies, California interferes with the parties' choice of leaders. A party might decide, for example, that it will be more effective if a greater number of its official leaders are local activists rather than Washington-based elected officials. The Code prevents such a change. A party might also decide that the state central committee chair needs more than two years to successfully formulate and implement policy. The Code prevents such an extension of the chair's term of office. A party might find that a resident of northern California would be particularly effective in promoting the party's message and in unifying the party. The Code prevents her from chairing the state central committee unless the preceding chair was from the southern part of the State.

<u>FN20.</u> For example, the Libertarian Party was forced to abandon its region-based organization in favor of the statutorily mandated county-based system.

Each restriction thus limits a political party's discretion in how to organize itself, conduct its affairs, and select its leaders. Indeed, the associational rights at stake are much stronger than those we credited in *Tashjian*. There, we found that a party's right to free association embraces a right to allow registered voters who are not party members to vote in the party's primary. Here, party members do not seek to *231 associate with nonparty members, but only with one another in freely choosing their party leaders. FN21

<u>FN21.</u> By regulating the identity of the parties' leaders, the challenged statutes may also color the parties' message and interfere with the parties' decisions as to the best means to promote that message.

[13] Because the challenged laws burden the associational rights of political parties and their members, the question is whether they serve a compelling state interest. A State indisputably has a compelling interest in preserving the integrity of its election process. Rosario v. Rockefeller, 410 U.S. 752, 761, 93 S.Ct. 1245, 1251-1252, 36 L.Ed.2d 1 (1973). Toward that end, a State may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest. Storer v. Brown, 415 U.S., at 730, 94 S.Ct., at 1279. For example, a State may impose certain eligibility requirements for voters in the general election even though they limit parties' ability to garner support and members. See, e.g., <u>Dunn v. Blumstein</u>, 405 U.S., at 343-344, 92 S.Ct., at 1003-1004 (residence requirement); Oregon v. Mitchell, 400 U.S. 112, 118, 91 S.Ct. 260, 261-262, 27 L.Ed.2d 272 (1970) (age minimum); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 625, 89 S.Ct. 1886, 1888-1889, 23 L.Ed.2d 583 (1969) (citizenship requirement). We have also recognized that a State may impose restrictions that promote the integrity of primary elections. See, e.g., American Party of Texas v. White, 415 U.S., at 779-780, 94 S.Ct., at 1305-1306 (requirement that major political parties nominate candidates through a primary and that minor parties nominate candidates through conventions); id., at 785-786, 94 S.Ct., at 1308-1309 (limitation on voters' participation to one primary and bar on voters both voting in a party primary and signing a petition supporting an independent candidate); Rosario v. Rockefeller, supra (waiting periods before voters may change party registration and participate**1025 in another party's primary); Bullock v. Carter, 405 U.S., at 145, 92 S.Ct., at 856-857 (reasonable filing fees as a condition of placement on the ballot). None of these restrictions, however, involved direct regulation of *232 a party's leaders. FN22 Rather, the

infringement on the associational rights of the parties and their members was the indirect consequence of laws necessary to the successful completion of a party's external responsibilities in ensuring the order and fairness of elections.

FN22. Marchioro v. Chaney, 442 U.S. 191, 99 S.Ct. 2243, 60 L.Ed.2d 816 (1979), is not to the contrary. There we upheld a Washington statute mandating that political parties create a state central committee, to which the Democratic Party, not the State, had assigned significant responsibilities in administering the party, raising and distributing funds to candidates, conducting campaigns, and setting party policy. *Id.*, at 198-199, 99 S.Ct., at 2247-2248. The statute only required that the state central committee perform certain limited functions such as filling vacancies on the party ticket, nominating Presidential electors and delegates to national conventions, and calling state-wide conventions. The party members did not claim that these *statutory* requirements imposed impermissible burdens on the party or themselves, so we had no occasion to consider whether the challenged law burdened the party's First Amendment rights, and if so, whether the law served a compelling state interest. *Id.*, at 197, n. 12, 99 S.Ct. at 2247, n. 12. Here, in contrast, it is state law, not a political party's charter, that places the state central committees at a party's helm, and in particular, assigns the statutorily mandated committee responsibility for conducting the party's campaigns.

[14] In the instant case, the State has not shown that its regulation of internal party governance is necessary to the integrity of the electoral process. Instead, it contends that the challenged laws serve a compelling "interest in the 'democratic management of the political party's internal affairs.' "Brief for Appellants 43 (quoting 415 U.S., at 781, n. 15, 94 S.Ct., at 1307, n. 15). This, however, is not a case where intervention is necessary to prevent the derogation of the civil rights of party adherents. Cf. Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944). Moreover, as we have observed, the State has no interest in "protect[ing] the integrity of the Party against the Party itself." Tashjian, 479 U.S., at 224, 107 S.Ct., at 554. The State further claims that limiting the term of the state central committee chair and requiring that the chair rotate between residents of northern and southern California helps "prevent regional friction from reaching a 'critical mass.' " Brief for Appellants 48. However,a *233 State cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure, any more than it can tell a party that its proposed communication to party members is unwise. Tashjian, supra, at 224, 107 S.Ct., at 554.

In sum, a State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure an election that is orderly and fair. Because California has made no such showing here, the challenged laws cannot be upheld. FN23

<u>FN23.</u> Because we find that curbing intraparty friction is not a compelling state interest as long as the electoral process remains fair and orderly, we need not address the appellees' contention that the challenged laws weaken rather than strengthen parties.

For the reasons stated above, we hold that the challenged California election laws burden the First Amendment rights of political parties and their members without serving a compelling state interest. Accordingly, the judgment of the Court of Appeals is *Affirmed*.

Chief Justice REHNQUIST took no part in the consideration or decision of this case. Justice STEVENS, concurring.

Today the Court relies on its opinion in *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183-185, 99 S.Ct. 983, 989-991, 59 L.Ed.2d 230 (1979)-and, in particular, on a portion of that opinion that I did not join-for its formulation of **1026 the governing standards in election cases. In that case Justice BLACKMUN explained his acceptance of the Court's approach in words that precisely express my views about this case. He wrote:

"Although I join the Court's opinion ..., I add these comments to record purposefully, and perhaps somewhat belatedly, my unrelieved discomfort with what *234 seems to be a continuing tendency in this Court to use as tests such easy phrases as 'compelling [state] interest' and 'least drastic [or restrictive] means.' See, <u>ante</u>, at 184, 185, and 186 [99 S.Ct. at 990, 990-991, and 991]. I have never been able fully to appreciate just what a 'compelling state interest' is. If it means 'convincingly controlling,' or 'incapable of being overcome' upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all. And, for me, 'least drastic means' is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down. This is reminiscent of the Court's indulgence, a few decades ago, in substantive due process in the economic area as a means of nullification.

"I feel, therefore, and have always felt, that these phrases are really not very helpful for constitutional analysis. They are too convenient and result oriented, and I must endeavor to disassociate myself from them. Apart from their use, however, the result the Court reaches here is the correct one. It is with these reservations that I join the Court's opinion." <u>Id.</u>, at 188-189, 99 S.Ct. at 992.

With those same reservations I join the Court's opinion today.

U.S.Cal.,1989.

Eu v. San Francisco County Democratic Cent. Committee 489 U.S. 214, 109 S.Ct. 1013, 103 L.Ed.2d 271, 57 USLW 4251

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Supreme Court of Washington, En Banc.

Linda J. KUCERA, Donald W. Green, Jackie A. Rossworn, and Nancy Leonard, individually and on behalf of all others similarly situated, Respondents,

v.

The STATE of Washington, DEPARTMENT OF TRANSPORTATION, and the Washington State Ferries, Petitioners.

No. 68428-6.

Argued Jan. 25, 2000. Decided March 16, 2000.

Landowners whose shoreline property was allegedly damaged by large wakes from a passenger ferry brought class action against the Department of Transportation, Washington State Ferries, a county, and a city, seeking monetary damages and declaratory and injunctive relief, and claiming inverse condemnation, violation of the Shoreline Management Act of 1971 (SMA), trespass, negligence, nuisance, and violation of State Environmental Policy Act (SEPA). The Superior Court, Kitsap County, Glenna Hall, J., entered a preliminary injunction limiting the speed of the ferry along a portion of its run pending compliance with SEPA, and defendants moved for direct discretionary review. Granting their motions, the Supreme Court, En Banc, Sanders, J., held that trial court should have considered whether the property owners had an adequate remedy at law and whether the high-speed operation of the passenger ferry caused actual and substantial injury, and should have balanced the relative interests of the parties and the public.

Preliminary injunction dissolved, and remanded.

Johnson, J., filed concurring opinion in which <u>Bridge</u>, J., joined.

West Headnotes

[1] Appeal and Error 30 \$\infty\$954(1)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k950 Provisional Remedies
30k954 Injunction
30k954(1) k. In General. Most Cited Cases

Trial court's decision to grant an injunction and its decision regarding the terms of the injunction are reviewed for abuse of discretion.

[2] Injunction 212 5 1

212 Injunction212I Nature and Grounds in General

212I(A) Nature and Form of Remedy

212k1 k. Nature and Purpose in General. Most Cited Cases

Trial court necessarily abuses its discretion to grant an injunction and to decide on the terms of the injunction if the decision is based upon untenable grounds, or is manifestly unreasonable or arbitrary.

[3] Injunction 212 \$\infty\$16

212 Injunction

212I Nature and Grounds in General

212I(B) Grounds of Relief

212k15 Inadequacy of Remedy at Law

212k16 k. In General. Most Cited Cases

Injunction 212 € 106

212 Injunction

212III Actions for Injunctions

212k106 k. Nature and Form. Most Cited Cases

Injunction is distinctly an equitable remedy, and will not be granted where there is a plain, complete, speedy and adequate remedy at law.

[4] Injunction 212 5 9

212 Injunction

212I Nature and Grounds in General

212I(B) Grounds of Relief

212k9 k. Nature and Existence of Right Requiring Protection. Most Cited Cases

Injunction 212 € 138.1

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Procure

212IV(A)2 Grounds and Objections

212k138.1 k. In General. Most Cited Cases

One who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him; since injunctions are addressed to the equitable powers of the court, the listed criteria must be examined in light of equity including balancing the relative interests of the parties and, if appropriate, the interests of the public.

[5] Environmental Law 149E 5701

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149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek699 Injunction
149Ek701 k. Preliminary Injunction. Most Cited Cases
(Formerly 199k25.15(3) Health and Environment)
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Shoreline property owners had an adequate remedy at law in the form of monetary damages for erosion allegedly caused by large wakes from a passenger ferry, and thus, were not entitled to preliminary injunctive relief limiting the speed of the ferry pending compliance with the State Environmental Policy Act (SEPA); specific injuries complained of, decreased property values and damage to bulkheads, landscaping, and other structures, could be easily compensated by money damages. West's RCWA Const. Art. 1, § 16; West's RCWA 43.21C.010 et seq.

[6] Environmental Law 149E \$\infty\$=656

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149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek649 Persons Entitled to Sue or Seek Review; Standing
149Ek656 k. Other Particular Parties. Most Cited Cases
(Formerly 199k25.15(4.1) Health and Environment)
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Shoreline property owners pleaded a sufficient injury in fact to have standing under the State Environmental Policy Act (SEPA) to challenge the operation of a passenger ferry whose large wakes allegedly caused damage to the shoreline environment; their SEPA claim was based on the State's alleged failure to consider the environmental effects of the ferry, not its economic effects, and they alleged damage to both private and public shorelines. West's RCWA 43.21C.010 et seq.

[7] Environmental Law 149E € 651

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149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek649 Persons Entitled to Sue or Seek Review; Standing
149Ek651 k. Cognizable Interests and Injuries, in General. Most Cited Cases
(Formerly 199k25.15(4.1) Health and Environment)
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Party wishing to challenge actions under State Environmental Policy Act (SEPA) must meet a two-part standing test: (1) the alleged endangered interest must fall within the zone of interests protected by SEPA, and (2) the party must allege an injury in fact. West's RCWA 43.21C.010 et seq.

[8] Environmental Law 149E \$\iint\$651

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149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek649 Persons Entitled to Sue or Seek Review; Standing
149Ek651 k. Cognizable Interests and Injuries, in General. Most Cited Cases
(Formerly 199k25.15(4.1) Health and Environment)
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Purely economic interests are not within the zone of interests protected by State Environmental Policy Act (SEPA), for purposes of determining standing. West's RCWA 43.21C.010 et seq.

[9] Environmental Law 149E 577

149E Environmental Law

149EXII Assessments and Impact Statements

<u>149Ek577</u> k. Duty of Government Bodies to Consider Environment in General. <u>Most</u> Cited Cases

(Formerly 199k25.10(1) Health and Environment)

State Environmental Policy Act (SEPA) is concerned with broad questions of environmental impact, identification of unavoidable adverse environmental effects, choices between long and short term environmental uses, and identification of the commitment of environmental resources. West's RCWA 43.21C.010 et seq.

[10] Action 13 © 13

13 Action

13I Grounds and Conditions Precedent

13k13 k. Persons Entitled to Sue. Most Cited Cases

Injury in fact element of standing is satisfied when a plaintiff alleges the challenged action will cause a specific and perceptible harm.

[11] Action 13 © 13

13 Action

13I Grounds and Conditions Precedent

13k13 k. Persons Entitled to Sue. Most Cited Cases

Sufficient injury in fact, for standing purposes, is properly pleaded when a property owner alleges immediate, concrete, and specific damage to property, even though the allegations may be speculative and undocumented.

[12] Injunction 212 5-9

212 Injunction

212I Nature and Grounds in General

212I(B) Grounds of Relief

212k9 k. Nature and Existence of Right Requiring Protection. Most Cited Cases

When deciding whether a party has a clear legal or equitable right, for purposes of injunctive relief, the court examines the likelihood that the moving party will prevail on the merits.

[13] Injunction 212 © 151

212 Injunction

212IV Preliminary and Interlocutory Injunctions

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212IV(A) Grounds and Proceedings to Procure
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212IV(A)4 Proceedings

212k151 k. Scope of Inquiry and Questions Considered. Most Cited Cases

Although generally a reviewing court is not to adjudicate the ultimate rights in the case when addressing the propriety of a preliminary injunction, the court may reach the merits of any purely legal question provided that the interim harm factor is undisputed.

[14] Injunction 212 \$\iiin\$ 157

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Procure

212IV(A)4 Proceedings

212k156 Order on Application

212k157 k. In General. Most Cited Cases

Trial court's failure to make any finding as to whether deployment or operation of a passenger ferry caused harm to shoreline property when determining whether to issue preliminary injunctive relief under the State Environmental Policy Act (SEPA) was an abuse of discretion; absent such a finding, shoreline property owners could not satisfy their burden of establishing actual and substantial harm. West's RCWA 43.21C.010 et seq.; Wash. Admin. Code § 197-11-310.

[15] Courts 106 \$\iins\$89

106 Courts

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k88 Previous Decisions as Controlling or as Precedents

106k89 k. In General. Most Cited Cases

Appellate court does not rely on cases that fail to specifically raise or decide an issue.

[16] Injunction 212 € 12

212 Injunction

212I Nature and Grounds in General

212I(B) Grounds of Relief

212k12 k. Injury Sustained or Anticipated. Most Cited Cases

Injunction 212 € 13

212 Injunction

212I Nature and Grounds in General

212I(B) Grounds of Relief

212k13 k. Substantial Character of Right or of Injury. Most Cited Cases

Injunction is an extraordinary equitable remedy designed to prevent serious harm; its purpose is

not to protect a plaintiff from mere inconveniences or speculative and insubstantial injury.

[17] Environmental Law 149E 5 701

149E Environmental Law

149EXIII Judicial Review or Intervention

149Ek699 Injunction

149Ek701 k. Preliminary Injunction. Most Cited Cases

(Formerly 199k25.15(3) Health and Environment)

Even assuming that deployment or operation of a passenger ferry was causing actual and substantial injury to the environment, issuance of a preliminary injunction pursuant to the State Environmental Policy Act (SEPA) without balancing the relative interests of the parties and the public was an abuse of discretion. West's RCWA 43.21C.010 et seq.

[18] Environmental Law 149E 577

149E Environmental Law

149EXII Assessments and Impact Statements

<u>149Ek577</u> k. Duty of Government Bodies to Consider Environment in General. <u>Most Cited Cases</u>

(Formerly 199k25.10(1) Health and Environment)

While the public policy behind the State Environmental Policy Act (SEPA) is stronger than that behind National Environmental Policy Act (NEPA), the legislative adoption of SEPA was not intended to prevent the consideration of competing factors when making a decision that potentially affects the environment. National Environmental Policy Act of 1969, § 2, 42 U.S.C.A. § 4321; West's RCWA 43.21C.010 et seq.

[19] Environmental Law 149E \$\infty\$=603

149E Environmental Law

149EXII Assessments and Impact Statements

149Ek598 Adequacy of Statement, Consideration, or Compliance

149Ek603 k. Cost-Benefit Analysis. Most Cited Cases

(Formerly 199k25.10(7) Health and Environment)

State Environmental Policy Act (SEPA) does not require that those evaluating a proposed action consider environmental factors alone; rather, the essential factors balanced frequently are the substantiality and likelihood of environmental cost and economic cost. West's RCWA 43.21C.010 et seq.

[20] Environmental Law 149E \$\infty\$=603

149E Environmental Law

149EXII Assessments and Impact Statements

149Ek598 Adequacy of Statement, Consideration, or Compliance

149Ek603 k. Cost-Benefit Analysis. Most Cited Cases

(Formerly 199k25.10(7) Health and Environment)

Environmental impact statement (EIS) is the basis upon which responsible agency and officials can make the balancing judgment mandated by State Environmental Policy Act (SEPA) between the benefits to be gained by a proposed major action and its impact upon the environment. <u>West's RCWA 43.21C.010</u> et seq.

[21] Environmental Law 149E \$\infty\$=673

149E Environmental Law

149EXIII Judicial Review or Intervention

149Ek673 k. Pleading, Petition, or Application. Most Cited Cases

(Formerly 199k25.15(3.1) Health and Environment)

Claim that State's violation of the Shoreline Management Act (SMA) entitled property owners to a writ of mandamus and provided an alternative basis for upholding the trial court's issuance of preliminary injunctive relief was not properly preserved for review where it was not raised in answer to defense motions for discretionary review, and thus, the claim would not be addressed. RAP 13.7(b).

**65 *202 <u>Galen George Schuler</u>, Seattle, Amicus Curiae on Behalf of Citizens for Reliable and Fair Trans.

Kent C. Meyer, Seattle, Amicus Curiae on Behalf of Kitsap Transit Authority.

Foster, Pepper & Shefelman, <u>Richard L. Settle</u>, Seattle, Amicus Curiae on Behalf of Passenger Vessel Association.

Brent David Lloyd, Seattle, Amicus Curiae on Behalf of Washington Environmental Council.

Glenna Malanca, Knute Rife, Asst. City Atty's, Bremerton, <u>Christine Gregoire</u>, Atty. Gen., <u>William Williams</u>, Heidi Irvin, Asst. Atty's Gen., Olympia, Russell Hauge, Kitsap County Prosecutor, Jacquelyn Aufderheide, Shelley Kneip, Deputies, Port Orchard, for Petitioners.

Steve Berman, Sean Matt, Andrew Volk, Seattle, for Respondents.

SANDERS, J.

Petitioners Department of Transportation, Washington State Ferries, Kitsap County, and the City of *203 Bremerton seek relief from a preliminary injunction limiting the speed of a passenger ferry, the Chinook, along a portion of its run pending compliance with the State Environmental Policy Act of 1971 (SEPA), chapter 43.21C RCW. We granted petitioners' motion for direct discretionary review to consider whether the trial court properly granted injunctive relief pending compliance with SEPA.

We hold the trial court improperly disregarded the established prerequisites for issuance of a preliminary injunction by granting such relief without finding (1) the property owners have an

inadequate remedy at law, and (2) the high-speed operation of the *Chinook* causes actual, substantial, and irreparable injury to the shoreline or the environment. In addition to these errors, the trial court erroneously refused to balance the relative interests of the parties and the general public. Accordingly, we dissolve the trial court's preliminary injunction slowing the *Chinook*.

FACTS

The Washington State Department of Transportation (DOT), through Washington State Ferries (WSF), operates passenger and automobile ferries throughout the Puget Sound and has been doing so since it acquired the former Puget Sound Navigation Company in 1951. FNI

<u>FN1.</u> For a detailed history of the vessels and operations of the Washington State Ferries and its predecessors, *see* Mary Stiles Kline & George Albert Bayless, *Ferryboats: A Legend on Puget Sound* (1983).

The Bremerton-Seattle route is part of State Route 304 and is served by both automobile and passenger-only ferries. <u>RCW 47.17.556</u>. On the route, ferries transit Rich Passage, a narrow one-mile long passage between**66 the Kitsap Peninsula and the southern tip of Bainbridge Island.

Bremerton was served throughout the 1970s by 160-car, 2,500-passenger ferries of the Super Class. These vessels, with v-shaped hulls and very high length-to-beam ratio, could, despite their size, transit Rich Passage at 18 knots *204 without an objectionable wake. In the 1980s, the introduction of the Issaquah-Class ferries, with a lower length-to-beam ratio, led to the first complaints from property owners along the shores of Rich Passage. Consequently, these vessels were slowed for the one-mile portion of the narrow Rich Passage.

When WSF instituted passenger-only service along the Bremerton-Seattle route with the Tyee, complaints increased and this vessel was slowed through Rich Passage. In 1990, WSF deployed two single-hulled vessels, the Skagit and Kalama. At their respective speeds of 25 and 27 knots, these single-hulled vessels generated very high wake wash, which caused increased complaints from residents at new locations outside the narrow choke point of Rich Passage. In response to these complaints, WSF voluntarily slowed these vessels to 11 knots from the start of Rich Passage all the way to Bremerton, a distance of 5.2 nautical miles. FN2

<u>FN2.</u> While the *Tyee* could travel at full speed between Bremerton and the west entrance of Rich Passage, the monohulls could not. Clerk's Papers (CP) at 1359-60.

WSF then commissioned a study to determine whether the high-speed operations had caused any damage to the Rich Passage shoreline and what could be anticipated if the vessels continued to operate at the slower speeds. The study concluded the shoreline had not suffered significant damage, but noted that long term high-speed operation of those specific vessels could be problematic. The study also concluded the wake wash of the two vessels traveling at 11 knots would have a negligible effect on the shoreline. The WSF engineering staff used this conclusion to develop a wake wash performance standard for new vessels designed to provide high-speed passenger service along the route. The wave energy produced by the *Skagit* and *Kalama* at 11

knots was measured and utilized to create a wave energy standard that was ultimately incorporated into the contracting process for the acquisition of the *Chinook*.

WSF acquired the *Chinook* through a legislatively *205 authorized design-build contract. With a twin-hulled catamaran design, the *Chinook* was designed to meet the wake wash ("no-harm") ^{FN3} standard developed by WSF to attain the self-imposed goal of making vessel operation relatively imperceptible on the Rich Passage shoreline.

<u>FN3.</u> The parameters of the no-harm standard are 2,450 joules per meter (a measure of the wave's energy) for the highest wave in the wave train and a maximum wave height of 28 centimeters. In order to meet the no-harm standard, the State alleges the *Chinook* must travel at speeds equal to or greater than 34 knots.

In May 1998 WSF commenced operation of the *Chinook* to provide high-speed passenger service on the Bremerton-Seattle ferry route. The *Chinook* is the first of two passenger-only ferries acquired by WSF to provide high-speed passenger service along the Bremerton-Seattle route. The vessel has a 34-knot service speed, allowing a crossing time of approximately 30 minutes, a considerable improvement over existing vessels. In addition, the faster crossing time allows for more frequent departure times. A sister ship, the *Snohomish*, was scheduled to begin service in September 1999.

Early results indicated the *Chinook* was an immediate success with ferry commuters. In the first three quarters of operation, passenger travel on the Bremerton-Seattle route increased by 210%, 182%, and 156%, respectively, as compared with the same periods the previous year. Simultaneously, the number of automobiles on the Bremerton-Seattle route decreased, even though total ridership continued to increase.

However not long after the *Chinook* began operating, a number of property owners along Rich Passage again complained that the wake from the vessel was damaging the shoreline in front of their homes. On April **67 22, 1999, property owners instituted the present class action lawsuit against the State seeking monetary damages and injunctive relief for inverse condemnation and violation of the Shoreline Management Act of 1971 (SMA), chapter 90.58 *206 RCW. EN4 Later, the property owners filed an amended complaint for declaratory and injunctive relief and damages, adding causes of action for trespass, negligence, nuisance, and violation of SEPA.

<u>FN4.</u> The property owners filed their case as a class action on behalf of "[a]ll persons who own waterfront property ... between Clam Bay and the Bremerton ferry landing ... and who have sustained [specified] damage since May 1998...." CP at 7. On October 15, 1999, the trial court certified the class respondents represent, consisting of waterfront property owners along Rich Passage and nearer to the Bremerton ferry dock, with the limitation that those pursuing tort damages must file tort claims as required by <u>RCW 4.92.110</u>. Apparently, there are several hundred parcels of real estate within the area described in the class certification order.

On May 19, 1999, the property owners moved for a preliminary injunction, requesting the court

to order WSF to slow the *Chinook* while transiting Rich Passage. The property owners relied on their trespass, negligence, nuisance, SMA, and SEPA claims to justify the preliminary relief sought. The State vigorously objected to the request for a preliminary injunction, arguing that deployment and operation of a vessel along an established ferry route is not an "action" as that term is defined in <u>WAC 197-11-704</u> for purposes of SEPA. The State also asked the court to balance the equities and competing interests of the parties before granting even a temporary injunction.

The trial court conducted an evidentiary hearing on the motion for preliminary injunction on July 13-15 and July 20, 1999. Both parties submitted voluminous evidence on the issue of whether alleged changes to the shoreline of Rich Passage were the result of the operation the *Chinook*, as contended by the property owners, or resulted from other causes.

In its order granting a preliminary injunction, the trial court concluded "the requirements of SEPA clearly apply to the deployment and operation of the Chinook in the wave impact area." Clerk's Papers (CP) at 2644. Although the court found "[i]t is undisputed that significant erosion has occurred to certain properties in the wave impact area since the introduction of the Chinook," CP at 2643, the court declined to find the operation of the *Chinook* in fact *207 caused these changes to the shoreline along Rich Passage. Nevertheless, the court found "[t]he introduction of high-speed ferry operations in Rich Passage had at least the potential for affecting the environment," CP at 2642, and thus concluded the State violated SEPA as no formal and public environmental analysis was done prior to the commencement of the *Chinook* 's operations in the wave impact area. The trial court also reasoned:

Although at this time it is not entirely clear to the Court at which point the Washington State Ferry System should have made a threshold determination, nevertheless the Court holds that SEPA clearly applies to the Ferry System's placing the Chinook in service for high-speed operations.

CP at 2646-47.

The trial court rejected the argument that, in deciding whether to issue a preliminary injunction, it should consider whether the property owners had an adequate remedy at law and balance the competing interests of the property owners with those of the general public. Instead, the court reasoned:

[B]oth the caselaw and the policy underlying the Act strongly suggest that a total failure to follow the minimum requirements of SEPA in an environmentally sensitive area does not require further proof of harm or a balancing of interests.

CP at 2647. Accordingly, the trial court granted the property owners' motion for a preliminary injunction and ordered the *Chinook* slowed to 12 knots or less through the "wave impact area" pending full compliance with SEPA.

FN5. The court defined the "wave impact area" as the portion of the ferry route between

Bremerton and the entrance to Rich Passage at Orchard Point. CP at 2642 n.1.

On August 13, 1999, the court issued its order regarding the preliminary injunction bond, requiring the property owners to post a bond of \$10,000. In its memorandum opinion, the trial court concluded the State failed to present significant evidence of potential economic damages it *208 would be likely to suffer from a wrongful injunction and reasoned,**68 "the court is unlikely to learn facts at trial that might convince it that SEPA does not apply, and does not consider the cost of complying with state law an element of damage." CP at 2639.

While the bond issue was pending, Kitsap County and the City of Bremerton were allowed to intervene to contest the injunction. The defendants then moved for reconsideration and for a stay of the injunction pending appellate review. On August 30, 1999, the court denied these motions. At the same time, however, the court entered an agreed order supplementing the injunction. Specifically, the court (1) ordered the State to immediately begin SEPA review, (2) directed the County to convene an advisory committee consisting of waterfront property owners, ferry commuters, business representatives, an expert in hydrodynamics or oceanographic design, a shoreline biologist, and representatives of local and state agencies, (3) directed the parties to explore alternatives to the current situation, including various ways of reducing wake energy or the potential impact of wake energy from the boats, with the goal of implementing an alternative within six months, and (4) ordered the parties to submit a progress report regarding the SEPA review and the implementation of alternatives by November 15, 1999.

On August 23, 1999, the State and Kitsap County moved this court for an emergency stay of the injunction pending this court's decision whether to grant discretionary review, which we denied. Subsequently, the State, Kitsap County, and the City of Bremerton moved for direct discretionary review and requested accelerated review. We granted petitioners' motions for discretionary review on November 3, 1999.

Preliminary Injunction

We granted petitioners' motion for direct discretionary review to consider whether the trial court properly granted *209 an injunction slowing the *Chinook* pending compliance with SEPA. Although the trial court declined to find the operation of the *Chinook* in fact caused erosion to the shoreline along Rich Passage, it granted the requested preliminary relief, reasoning: "both the caselaw and the policy underlying the Act strongly suggest that a total failure to follow the minimum requirements of SEPA in an environmentally sensitive area does not require further proof of harm or a balancing of interests." CP at 2647.

[1][2] A trial court's decision to grant an injunction and its decision regarding the terms of the injunction are reviewed for abuse of discretion. <u>Washington Fed'n of State Employees v. State</u>, 99 Wash.2d 878, 887, 665 P.2d 1337 (1983). A trial court necessarily abuses its discretion if the decision is based upon untenable grounds, or the decision is manifestly unreasonable or arbitrary. *Id*.

[3] An injunction is distinctly an equitable remedy and is "frequently termed 'the strong arm of

equity,' or a 'transcendent or extraordinary remedy,' and is a remedy which should not be lightly indulged in, but should be used sparingly and only in a clear and plain case." 42 Am.Jur.2d *Injunctions* § 2, at 728 (1969) (footnotes omitted). Accordingly, injunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law. *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wash.2d 298, 312, 553 P.2d 423 (1976).

[4] The applicable requirements for issuance of a preliminary injunction are well settled:

"[O]ne who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him."

....

[S]ince injunctions are addressed to the equitable powers of the court, the listed criteria must be examined in light of equity including balancing the relative interests of the parties and, if appropriate, the interests of the public.

*210 Tyler Pipe Indus., Inc. v. Department of Revenue, 96 Wash.2d 785, 792, 638 P.2d 1213 (1982) (quoting **69Port of Seattle v. International Longshoremen's & Warehousemen's Union, 52 Wash.2d 317, 319, 324 P.2d 1099 (1958)); see also RCW 7.40.020 (grounds for issuance of preliminary injunction). Find If a party seeking a preliminary injunction fails to establish any one of these requirements, the requested relief must be denied. Washington Fed'n, 99 Wash.2d at 888, 665 P.2d 1337.

FN6. RCW 7.40.020 provides, in part: "When it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff; or when during the litigation, it appears that the defendant is doing, or threatened, or is about to do, or is procuring, or is suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action tending to render the judgment ineffectual; or where such relief, or any part thereof, consists in restraining proceedings upon any final order or judgment, an injunction may be granted to restrain such act or proceedings until the further order of the court, which may afterwards be dissolved or modified upon motion."

A. Inadequate Legal Remedy

[5] In their motion for a preliminary injunction, the property owners argued "[t]he continued elimination of shellfish and other marine life on the shoreline is irreparable," CP at 66, and contended legal remedies were inadequate due to the continuing nature of the damage to bulkheads and unprotected property. Although the trial court found "[i]t is undisputed that significant erosion has occurred to certain properties," CP at 2643, the court did not find shellfish and other marine life faced imminent and irreparable elimination. Because the property owners

have an adequate remedy at law in the form of monetary damages, they have not demonstrated they are entitled to the extraordinary remedy of injunctive relief.

Courts have generally found remedies to be inadequate in three circumstances: (1) the injury complained of by its nature cannot be compensated by money damages, (2) the damages cannot be ascertained with any degree of certainty, and (3) the remedy at law would not be efficient because the injury is of a continuing nature. 15 Lewis H. Orland & *211 Karl B. Tegland, Washington Practice: Trial Practice, Civil § 646, at 468-69 (1996).

While it is true activities causing harm to the environment are frequently enjoined due to the irreparable nature of environmental injury, see, e.g., Amoco Prod. Co. v. Village of Gambell, AK, 480 U.S. 531, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987), here the trial court focused on the physical injury to certain parcels of private property. The specific injuries complained of by the property owners-decreased property values and damage to bulkheads, landscaping, and other structuresmay be easily compensated by money damages. See Steele v. Queen City Broad. Co., 54 Wash.2d 402, 341 P.2d 499 (1959) (damage remedy adequate compensation since owners were mainly concerned with the loss in value of their properties). Also, utilizing creative alternatives could prevent further damage to the shoreline property, without resorting to an injunction prohibiting the full-speed operation of the Chinook. See CP at 2652 (supplemental injunction order considering alternatives such as retrofitting the Chinook and installing floating breakwaters).

If the operation of the *Chinook* is found to be the cause of the alleged damages sustained by the property owners, a remedy is compensation for inverse condemnation under Wash. Const. art. I, § 16 (amend.9). "This court has held that in the interest of public policy, the State or a municipal corporation ... will not be ousted if it has wrongfully taken possession of the land and is, in fact, devoting it to a public use. The owner will be left to his remedy at law to recover damages...." *Brazil v. City of Auburn*, 93 Wash.2d 484, 488, 610 P.2d 909 (1980). As the *Chinook* is unquestionably a public use, the property owners may be entitled to compensation if the operation of the ferry is the proven cause of damage to their property. FN7 Thus, the property *212 owners failed to demonstrate**70 the absence of a complete and adequate remedy at law.

<u>FN7.</u> Arguably, the trial court could enjoin activities constituting an uncompensated taking or damaging to have the property damage ascertained and paid *before* permitting the alleged inverse condemnation to continue. *See Brown v. City of Seattle*, 5 Wash. 35, 31 P. 313 (1892) (holding article I, section 16 of our state constitution, which provides that no private property shall be taken or damaged for public or private use without just compensation having been *first* made, provides basis for imposing an injunction preventing the grading of a street until city compensated property owner for damages).

B. Clear Legal or Equitable Right

In its preliminary injunction order limiting the speed of the *Chinook*, the trial court found as a matter of law "the requirements of SEPA clearly apply to the deployment and operation of the Chinook in the wave impact area." CP at 2644. Finding the requirements of SEPA applicable, the

trial court tacitly concluded the property owners had demonstrated a clear legal right.

[6] As an initial matter, amicus curiae Citizens for Reliable and Fair Transportation (CRAFT) contends the property owners have no protectable interest under SEPA because neither economic nor property interests are within the zone of interests protected by the statute. Br. of Amicus CRAFT at 8-9. This implied challenge to the property owners' standing is without merit.

[7] A party wishing to challenge actions under SEPA must meet a two-part standing test: (1) the alleged endangered interest must fall within the zone of interests protected by SEPA, and (2) the party must allege an injury in fact. <u>Leavitt v. Jefferson County</u>, 74 Wash.App. 668, 678-79, 875 P.2d 681 (1994). The property owners here clearly meet both of these elements.

[8][9] It is well established that purely economic interests are not within the zone of interests protected by SEPA. *See, e.g., Snohomish County Property Rights Alliance v. Snohomish County,* 76 Wash.App. 44, 52-53, 882 P.2d 807 (1994). However, the property owners here allege damage to the shoreline environment of Rich Passage, an interest plainly protected by SEPA.

SEPA is concerned with "broad questions of environmental impact, identification of unavoidable adverse environmental *213 effects, choices between long and short term environmental uses, and identification of the commitment of environmental resources."

Id. (quoting <u>DeWeese v. City of Port Townsend</u>, 39 Wash.App. 369, 375, 693 P.2d 726 (1984)). While the property owners are undoubtedly motivated by a desire to protect the economic value of their properties, their SEPA claim is based on the State's alleged failure to consider the *environmental* effects of the *Chinook*, not its economic effects.

[10][11] The injury in fact element is satisfied when a plaintiff alleges the challenged action will cause "specific and perceptible harm." <u>Leavitt</u>, 74 Wash.App. at 679, 875 P.2d 681. A sufficient injury in fact is properly pleaded when a property owner alleges " 'immediate, concrete, and specific' " damage to property, even though the allegations may be "speculative and undocumented." *Id.* (quoting <u>Trepanier v. City of Everett</u>, 64 Wash.App. 380, 383, 824 P.2d 524 (1992)). As the property owners here have alleged damage to both private and public shorelines, they have properly pleaded a sufficient injury in fact.

Accordingly, the property owners clearly have standing to invoke SEPA. We next consider whether the trial court properly concluded the property owners demonstrated a clear legal right by ruling the requirements of SEPA apply to the deployment and operation of the *Chinook*.

SEPA recognizes the broad policy "that each person has a fundamental and inalienable right to a healthful environment...." RCW 43.21C.020(3). State agencies are required to use "all practicable means" to achieve the following goals:

(a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

- (b) Assure for all people of Washington safe, healthful, productive and aesthetically and culturally pleasing surroundings;
- (c) Attain the widest range of beneficial uses of the environment *214 without degradation, risk to health or safety, or other undesirable and unintended consequences[.]

RCW 43.21C.020(2)(a)-(c). To further these objectives, SEPA requires that governmental agencies prepare environmental impact statements on "major actions having a probable significant, adverse environmental impact." RCW 43.21C.031(1). However, not every governmental decision or action is subject to review under SEPA. If an agency action is **71 categorically exempt or does not meet the definition of "action" as provided in WAC 197-11-704, an agency is not required to make a threshold determination of the environmental impacts of a proposed action. See WAC 197-11-310.

The administrative rules implementing SEPA identify two categories of "actions" that fall within the statute's scope: (1) project actions, and (2) nonproject actions. WAC 197-11-704. In the instant case, the trial court determined "the definition of 'project action' does not appear to exclude the plan to deploy and operate the Chinook at 35 knots through Rich Passage." CP at 2645.

A "project action" is defined as:

- [A] decision on a specific project, such as a construction or management activity located in a defined geographic area. Projects include and are limited to agency decisions to:
 - (i) License, fund, or undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, an applicant, or under contract.
 - (ii) Purchase, sell, lease, transfer, or exchange natural resources, including publicly owned land, whether or not the environment is directly modified.

WAC 197-11-704(2)(a).

Petitioners contend the "deployment and operation of a single vessel on an established route between established terminal facilities" does not constitute a "project action" *215 under SEPA. Br. of Pet'r State at 29. FN8 Respondents concede "[m]ost environmental assessments conducted for transportation projects focus on structures, such as the construction or physical expansion of an airport or marine terminal." Br. of Resp'ts at 59. But although no reported decision has explicitly held the deployment and operation of a vehicle of transportation on an established route constitutes a "project action" subject to SEPA, respondents correctly note courts frequently require environmental review of nonstructural transportation actions. See <u>Downtown Traffic Planning Comm. v. Royer, 26 Wash.App. 156, 164-65, 612 P.2d 430 (1980)</u> (holding decision to implement an exclusive bus lane program in downtown Seattle was subject to SEPA);

Development Servs. of Am., Inc. v. City of Seattle, 138 Wash.2d 107, 111, 979 P.2d 387 (1999) (noting SEPA review considered the noise and land use impacts of a proposed helistop).

<u>FN8.</u> Similarly, amicus curiae Passenger Vessel Association (PVA) asserts "operational decisions assigning vessels and speeds are merely the implementation of the SEPA 'action' establishing the route and service...." Br. of Amicus PVA at 8.

FN9. In *Dioxin/Organochlorine Ctr. v. Pollution Control Hr'gs Bd.*, 131 Wash.2d 345, 360, 932 P.2d 158 (1997), we held subsequent amendments to SEPA effectively overruled this portion of *Downtown Traffic*. We recognized that "[t]he entire purpose of the system of categorical exemptions is to avoid the high transaction costs and delays that would result from case by case review of categorically exempt types of actions..." *Id.* at 363, 932 P.2d 158. Thus, the premise of *Downtown Traffic* -that courts may look beyond the nature of the activity to determine whether an otherwise categorically exempt activity is a major action requiring environmental review-has been rejected by *Dioxin*. Nevertheless, the notion that the *type* of decision involved in *Downtown Traffic* -the modification or alteration of an existing transportation program (bus service)-may be an "action" subject to environmental review has never been overruled.

A variety of transportation decisions have also been subject to environmental review under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321. FN10 See Cross-Sound Ferry Servs., Inc. v. United States, 573 F.2d 725, 732 (2d Cir.1978) (decision of Interstate *216 Commerce Commission that operation of ferries would not significantly affect the environment was reached after compliance with initial procedural requirements of NEPA); Strahan v. Linnon, 967 F.Supp. 581, 629 (D.Mass.1997) (holding **72 Coast Guard vessel operations required preparation of an Environmental Assessment under NEPA), aff'd, 187 F.3d 623 (1st Cir.1998); British Airways Bd. v. Port Authority of New York & New Jersey, 431 F.Supp. 1216, 1219 (S.D.N.Y.) (noting NEPA review was conducted before operating the Concorde), rev'd on other grounds by 558 F.2d 75 (2d Cir.1977); National Helicopter Corp. of Am. v. City of New York, 137 F.3d 81, 86 (2d Cir.1998) (corporation required to prepare an environmental impact statement to assess an existing heliport's noise effects on the environment); National Parks & Conservation Ass'n v. Federal Aviation Admin., 998 F.2d 1523, 1533 (10th Cir.1993) (reversing a finding of no significant impact under NEPA which approved construction, operation, and funding of an airport); Seattle Community Council Fed'n v. Federal Aviation Admin., 961 F.2d 829 (9th Cir.1992) (noting decision to alter flight patterns of turbine-powered aircraft using Seattle-Tacoma International Airport was subject to NEPA review). Thus, it is not unprecedented to require environmental review of nonstructural transportation actions.

<u>FN10.</u> Amicus PVA asserts, "NEPA case law is irrelevant on this issue since SEPA has authorized administrative rules that define 'action,' <u>WAC 197-11-704</u>, and NEPA has not." Br. of Amicus PVA at 10. Although the two statutes may contain slightly different definitions of the term "action," NEPA cases are nevertheless helpful in determining whether the deployment and operation of the *Chinook* is the *type* of agency action normally subject to environmental review. We have previously held "while NEPA and SEPA are substantially similar in intent and effect, ... the public policy behind SEPA is considerably stronger than that behind NEPA." <u>ASARCO Inc. v. Air Quality Coalition</u>, 92 Wash.2d 685, 709, 601 P.2d 501 (1979). Thus, it is reasonable to presume an "action"

subject to NEPA may also be subject to SEPA.

[12][13] When deciding whether a party has a clear legal or equitable right, the court examines the likelihood that the moving party will prevail on the merits. Rabon v. City of Seattle, 135 Wash.2d 278, 285, 957 P.2d 621 (1998). Although generally a reviewing court is not to adjudicate the ultimate rights in the case when addressing the propriety of a preliminary injunction, the "court may reach the merits of any purely legal question provided that the interim harm factor is undisputed." Id. (emphasis added). In the instant case, however, both parties vigorously dispute *217 whether the operation of the Chinook actually causes harm to the environment. Were we to hold SEPA does or does not apply to the State's actions here, our decision "would be the equivalent of a decision on the merits, a task for which this court is ill suited." Federal Way Family Physicians, Inc. v. Tacoma Stands Up for Life, 106 Wash.2d 261, 267, 721 P.2d 946 (1986). Accordingly we assume, without deciding, that SEPA applies to the deployment and operation of the Chinook for the purpose of our interlocutory review.

C. Fear of Immediate Invasion

Assuming the property owners have a legal right to require the State to comply with the procedural requirements of SEPA, the property owners have clearly demonstrated a well-grounded fear of immediate invasion of that right.

The trial court found "it is undisputed that defendants conducted no formal and public environmental analysis under SEPA of the deployment or operation of the vessel prior to the commencement of the Chinook's operations." CP at 2642. Thus, if SEPA applies to the deployment and operation of the *Chinook*, the property owners have demonstrated an invasion of that right as it is undisputed the State failed to comply with SEPA's procedural requirements prior to the deployment and operation of the *Chinook*.

D. Actual and Substantial Injury

Petitioners argue the trial court abused its discretion by issuing a preliminary injunction without finding the operation of the *Chinook* is causing or will cause actual and substantial injury to the environment. Respondents, however, maintain the trial court properly issued the injunction without a finding of causation.

[14] Although the trial court expressly made "no specific finding with regard to causation," it nevertheless issued the preliminary injunction requested by the property owners. The trial court reasoned:

*218 Defendants contend that even if a SEPA violation is found, the requirements for injunctive relief must still be met, and that the plaintiffs must affirmatively show they have met those requirements. It is certainly true that nothing in the statute automatically requires an injunction upon a finding of a SEPA violation. However, both the caselaw and the policy underlying the Act strongly suggest that a total failure to follow the minimum requirements of SEPA in an environmentally-sensitive area does not require further proof of harm or a balancing of

interests.

CP at 2051 (citing <u>King County v. Washington State Boundary Review Bd.</u>, 122 Wash.2d 648, 663, 860 P.2d 1024 (1993)). The trial court's disregard of the traditional prerequisites for entering a preliminary injunction**73 has no basis in either state or federal law and thus constitutes an abuse of discretion.

The only case cited by the trial court in support of its departure from established law is <u>King County v. Washington State Boundary Review Bd.</u>, 122 Wash.2d 648, 860 P.2d 1024. There, King County challenged the boundary review board's approval of a proposed annexation, arguing the determination of nonsignificance (DNS) for purposes of compliance with SEPA was clearly erroneous. We held the DNS was clearly erroneous and that an environmental impact statement (EIS) should have been issued. *Id.* at 667, 860 P.2d 1024. We then concluded:

In cases involving reversal of a DNS, it is necessary to remand to the agency for preparation of an EIS and enjoin the agency action until the statement is complete. We therefore reverse Black Diamond's DNS, enjoin the proposed annexations, and remand for further proceedings, including preparation of an EIS.

Id. (citations omitted).

Respondents maintain *Washington State Boundary Review Board* supports the proposition that "[i]f an immediate *219 injunction against further agency action is necessary when a DNS is reversed, *a fortiori*, an immediate injunction against agency action in violation of SEPA is necessary where, as here, that agency did not even bother to follow the minimum requirement of producing an environmental checklist." Br. of Resp'ts at 82. We do not find this argument persuasive.

The reversal of a DNS necessarily implies that a particular proposal is likely to have a significant adverse environmental impact, thus mandating the preparation of an EIS. See WAC 197-11-734; 197-11-736. Here, however, the trial court explicitly stated "[s]ince no threshold determination was made by the State, at this time the Court does not have sufficient information to determine if a DNS would have been sufficient or if an EIS would be required." CP at 2646 n.8. Thus, although the trial court held the State's actions here triggered the threshold determination requirement, see WAC 197-11-310, there has been no determination at this point that the deployment or operation of the Chinook is likely to have a significant adverse environmental impact, nor that the necessary preconditions for injunctive relief have been met even if it did. If neither the deployment nor operation of the Chinook significantly and adversely impacts the environment, there is clearly no threatened harm to enjoin. We find it illogical to enjoin an action without first finding the action is the cause of the alleged environmental harm and further finding in a factually specific way that the criteria for injunctive relief have been met.

[15] Not surprisingly, there are no Washington decisions that award injunctive relief without at least *first* finding the challenged action is likely to have a significant adverse environmental impact. In fact, of the cases cited by the respondents, *all* found that the preparation of an EIS and

completion of the SEPA process was required before the challenged action could continue. See Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wash.2d 475, 487, 513 P.2d 36, 76 A.L.R.3d 360 (1973) (failure to file an EIS prior to renewal of a building permit rendered the permit void); *220Sisley v. San Juan County, 89 Wash.2d 78, 87, 569 P.2d 712 (1977) (reversing DNS issued for construction of a marina and remanding for preparation of an EIS); Lassila v. City of Wenatchee, 89 Wash.2d 804, 816-17, 576 P.2d 54 (1978) (vacating amendment of city's comprehensive plan which contained environmental assessment but not an EIS); Noel v. Cole, 98 Wash.2d 375, 655 P.2d 245 (1982) (failure to prepare EIS prior to entering contract permitting logging on public land rendered contract ultra vires), superseded by statute on other grounds by Dioxin/Organochlorine Ctr. v. Pollution Control Hr'gs Bd., 131 Wash.2d 345, 932 P.2d 158 (1997). Further, not one of these decisions upheld the issuance of an *injunction* to remedy a SEPA violation. Instead, each case held that the failure to prepare an EIS rendered the challenged action void. Because "[w]e do not rely on cases that fail to specifically raise or decide an issue," In re Registration of Electric Lightwave, Inc., 123 Wash.2d 530, 541, 869 P.2d 1045 (1994), these cases cannot be **74 said to stand for the proposition that injunction relief is mandated following a SEPA violation.

The federal courts have consistently rejected the argument advanced by respondents when deciding whether to enjoin conduct in violation of NEPA.

In <u>Sierra Club v. Hennessy</u>, 695 F.2d 643 (2d Cir.1982), aff'd in part, rev'd in part on other grounds sub nom. <u>Sierra Club v. United States Army Corps of Engineers</u>, 701 F.2d 1011 (2d <u>Cir.1983</u>), the Second Circuit unequivocally stated:

A violation of NEPA does not necessarily require a reflexive resort to the drastic remedy of an injunction. In such cases, this Court has recognized that it must entertain normal considerations relative to the grant of equitable relief.

Id. at 648. And, in <u>Conservation Law Found., Inc. v. Busey</u>, 79 F.3d 1250, 157 A.L.R. Fed. 697 (1st Cir.1996), the court similarly denied injunctive relief even though it found NEPA had been violated.

As we emphasized [in *Watt* and *Marsh*], however, our holdings did not mean "that a likely NEPA violation automatically calls for an injunction; the *balance of harms* may point the other way."

*221 *Id.* at 1272 (quoting <u>Sierra Club v. Marsh</u>, 872 F.2d 497, 504 (1st Cir.1989) (quoting <u>Commonwealth v. Watt</u>, 716 F.2d 946, 952 (1st Cir.1983))); see also <u>Amoco Prod. Co.</u>, 480 U.S. 531, 107 S.Ct. 1396 (reversing holding that irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action).

[16] "An injunction is an extraordinary equitable remedy designed to prevent serious harm. Its purpose is not to protect a plaintiff from mere inconveniences or speculative and insubstantial injury." *Tyler Pipe Indus.*, 96 Wash.2d at 796, 638 P.2d 1213. As the trial court explicitly made no finding with regard to causation, it cannot be said the respondents satisfied their burden of establishing actual and substantial harm in their request for injunctive relief.

E. Balancing Interests

[17] Even assuming the *Chinook* is causing actual and substantial injury to the environment, the petitioners argue the trial court abused its discretion by issuing a preliminary injunction without balancing the relative interests of the parties and the public. We agree and find erroneous the conclusion that a "total failure to follow the minimum requirements of SEPA in an environmentally sensitive area does not require ... a balancing of interests." CP at 2051.

In <u>Romero-Barcelo v. Brown</u>, 478 F.Supp. 646 (D.Puerto Rico 1979), aff'd in part, vacated in part on other grounds by 643 F.2d 835 (1st Cir.1981) an action was brought seeking to enjoin the Navy from using the land and water surrounding an island in Puerto Rico for naval training operations. Although the Navy had taken *no action* to comply with the minimum requirements of NEPA, the court refused to enjoin the military activities pending compliance with NEPA without first balancing competing interests. The court reasoned:

Perhaps the most significant single component in the judicial decision whether to exercise equity jurisdiction and grant permanent injunctive relief, is the court's discretion. Being an extraordinary remedy, it is not granted routinely.

*222 "We are dealing here with the requirements of equity practice with a background of several hundred years of history.... *The historic injunctive process was designed to deter, not to punish.* The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."

....

If this balancing of competing interests is required where constitutional rights are at stake, can it be seriously argued that this Court should have a different standard where statutory matters are at issue? We think not.

<u>Romero-Barcelo</u>, 478 F.Supp. at 706 (quoting <u>Hecht Co. v. Bowles</u>, 321 U.S. 321, 329-30, 64 S.Ct. 587, 88 L.Ed. 754 (1944)). Because of the important public interests at stake and **75 the lack of clear environmental harm caused by the challenged activity, the Navy was permitted to continue its operations pending compliance with NEPA. <u>Romero-Barcelo</u>, 478 F.Supp. at 706-07.

In *Strahan v. Linnon*, the court concluded NEPA and the Endangered Species Act of 1973(ESA) 16 U.S.C. § 1531, applied to the Coast Guard's operation of its vessels. Although the Coast Guard had admittedly taken no action to comply with the minimum requirements of NEPA, the court refused to issue a preliminary injunction terminating the Coast Guard's operation of its vessels. *Strahan*, 967 F.Supp. 581, 615. In fact, the court noted that the ESA, a more restrictive environmental law, "if most strictly interpreted, could require the Coast Guard to cease all operations along the Atlantic Coast. Such an order would not be appropriate." *Id.* at 601.

In construing environmental statutes similar to NEPA, the federal courts have consistently suggested that the relief afforded must be the result of balancing of equities. In <u>Weinberger v. Romero-Barcelo</u>, 456 U.S. 305, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982), the Supreme Court held the Navy was not required to cease operations pending *223 compliance with the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1251. The Court first observed:

The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.

<u>Weinberger</u>, 456 U.S. at 313, 102 S.Ct. 1798 (citation omitted). The Court then examined the language and structure of the FWPCA and concluded that Congress did not intend to deny courts their traditional equitable discretion. *Id.* at 319, 102 S.Ct. 1798.

Rather than requiring a district court to issue an injunction for any and all statutory violations, the FWPCA permits the district court to order that relief it considers necessary to secure prompt compliance with the Act. That relief can include, but is not limited to, an order of immediate cessation.

Id. at 320, 102 S.Ct. 1798.

In <u>Amoco Prod. Co.</u>, 480 U.S. 531, 107 S.Ct. 1396, the Supreme Court rejected the presumption that injunctive relief is the appropriate remedy for a violation of an environmental statute absent rare or unusual circumstances. After examining the language and purpose of the statute at issue (the Alaska National Interest Lands Conservation Act), 16 U.S.C. § 3101, the Court concluded the Act simply "established a framework for reconciliation, where possible, of competing public interests." <u>Amoco Prod. Co.</u>, 480 U.S. at 546, 107 S.Ct. 1396. Thus, rather than relying upon a presumption contrary to traditional equitable principles, the Court reaffirmed the bases for injunctive relief are irreparable injury and inadequacy of legal remedies, noting that in each case a court must balance competing claims. *Id.* at 542, 107 S.Ct. 1396.

Respondents contend the NEPA cases are inapplicable given the strong policy statements contained in SEPA. "This strong policy statement by the Legislature shows that courts need not 'balance the equities' because the Legislature has already done the calculus in mandating compliance with SEPA." Br. of Resp'ts at 88. We disagree.

[18][19][20] *224 While it is true the public policy behind SEPA is stronger than that behind NEPA, the legislative adoption of SEPA was clearly not intended to prevent the consideration of competing factors when making a decision that potentially affects the environment.

[SEPA] does not require that those evaluating a proposed action consider environmental factors *alone*. Rather, the essential factors balanced frequently are the substantiality and likelihood of environmental cost *and* economic cost.

"[The environmental impact statement] is the basis upon which the responsible agency and

officials can make the balancing judgment mandated by SEPA between the benefits to be gained by the proposed 'major action' and its impact upon the environment."

**76 <u>ASARCO Inc. v. Air Quality Coalition</u>, 92 Wash.2d 685, 714, 601 P.2d 501 (1979) (quoting <u>Norway Hill Preservation & Protection Ass'n v. King County Council</u>, 87 Wash.2d 267, 272-73, 552 P.2d 674 (1976)). As SEPA itself contemplates the balancing of economic and environmental factors, a trial court too must apply traditional equitable principles and weigh competing interests when asked to enjoin a challenged action.

CONCLUSION

[21] Because the trial court did not consider whether the property owners have an adequate remedy at law, failed to find the high-speed operation of the *Chinook* causes actual and substantial injury, and refused to balance the relative interests of the parties and the public, the issuance of the injunction constitutes an abuse of discretion. "The court abused its discretion by failing to exercise discretion." *Bowcutt v. Delta N. Star Corp.*, 95 Wash.App. 311, 321, 976 P.2d 643 (1999). Accordingly, we dissolve the preliminary injunction slowing the *Chinook* pending compliance with *225 SEPA. FN11

<u>FN11.</u> Respondents argue the State's violation of the SMA entitles them to a writ of mandamus and provides an alternative basis for upholding the trial court's decision. Br. of Resp'ts at 124. However, respondents did not raise this issue in their answer to petitioners' motions for discretionary review. As respondents did not properly preserve this issue for our review, we decline to address their SMA arguments. *See* <u>RAP 13.7(b)</u> (Supreme Court will review only the questions raised in the motion for discretionary review and answer). Of course dissolution of the preliminary injunction is without prejudice to future application.

We remand the case to the trial court for proceedings consistent with this opinion.

<u>GUY</u>, C.J., <u>SMITH</u>, <u>MADSEN</u>, <u>ALEXANDER</u>, <u>TALMADGE</u>, <u>IRELAND</u>, and <u>BRIDGE</u>, JJ., concur.

JOHNSON, J. (concurring).

I agree with the result reached by the majority, but write separately to address the applicability of the State Environmental Policy Act of 1971 (SEPA), chapter 43.21C RCW, and the adequacy of a remedy at law for a SEPA violation.

When considering the grant or denial of a request for a preliminary injunction, the trial court is expected to reach the merits of purely legal questions so as to evaluate the propriety of the injunction. *Rabon v. City of Seattle*, 135 Wash.2d 278, 286, 957 P.2d 621 (1998); *Atwood v. Shanks*, 91 Wash.App. 404, 410, 958 P.2d 332, *review denied*, 136 Wash.2d 1029, 972 P.2d 464 (1998). In this case, the trial court was faced with the question of whether respondents had asserted a clear legal or equitable right, as required for a temporary injunction to issue. *See Rabon*, 135 Wash.2d at 284, 957 P.2d 621 (citing *Tyler Pipe Indus., Inc. v. Department of*

Revenue, 96 Wash.2d 785, 792, 638 P.2d 1213 (1982)). The trial court answered this question affirmatively by determining SEPA "clearly" applied to the facts of this case. Clerk's Papers at 2644 (Conclusion of Law 15).

In reaching this determination, the trial court entered extensive conclusions of law, and relied on the same cases cited by the majority. See majority at 71-72 (citing <u>Downtown Traffic Planning Comm. v. Royer, 26 Wash.App. 156, 612 P.2d 430 (1980)</u>, overruled on other grounds by *226 <u>Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd.</u>, 131 Wash.2d 345, 360, 932 P.2d 158 (1997); National Helicopter Corp. of Am. v. City of New York, 137 F.3d 81 (2d Cir.1998); National Parks & Conservation Ass'n v. Federal Aviation Admin., 998 F.2d 1523 (10th Cir.1993); Seattle Community Council Fed'n v. Federal Aviation Admin., 961 F.2d 829 (9th Cir.1992); British Airways Bd. v. Port Auth. of New York & New Jersey, 564 F.2d 1002 (2d Cir.1977); Strahan v. Linnon, 967 F.Supp. 581 (D.Mass.1997), aff'd, 187 F.3d 623 (1st Cir.1998)).

The trial court's conclusions of law demonstrate that it took the first step in the *Tyler Pipe* analysis discussed by the majority, and reached the correct result. *Tyler Pipe*, 96 Wash.2d at 792, 638 P.2d 1213 (first step in analyzing availability of injunctive relief is to determine if the party seeking relief has a clear legal or equitable right) (citing *Port of Seattle v. International Longshoremen's & Warehousemen's Union*, 52 Wash.2d 317, 319, 324 P.2d 1099 (1958)).

**77 The majority does not affirm or reverse this legal conclusion of the trial court because the question of whether the *Chinook* passenger ferry causes harm to the environment is still in dispute. Majority at 72. But, as the majority later points out, this dispute relates to the *next step* in the preliminary injunction analysis, whether " 'the acts complained of are either resulting in or will result in actual and substantial injury....' " *Tyler Pipe*, 96 Wash.2d at 792, 638 P.2d 1213 (quoting *Port of Seattle*, 52 Wash.2d at 319, 324 P.2d 1099); majority at 72. On remand, as the majority suggests, the trial court should reconsider the issue of actual harm in light of the "actual and substantial injury" prong of *Tyler Pipe*. Majority at 76 & n.11.

The conclusion that respondents have a clear legal right under SEPA, however, is based on the trial court's unchallenged factual findings that the State deployed the *Chinook* and the decision to do so had the *potential* for adverse affects on the environment. As the majority ably demonstrates, decisions regarding transportation deployment, regardless of whether they are "nonstructural," are subject *227 to SEPA review. Majority at 71 (citing *Downtown Traffic*, 26 Wash.App. at 164-65, 612 P.2d 430; *Development Servs. of Am., Inc. v. City of Seattle*, 138 Wash.2d 107, 979 P.2d 387 (1999)). The same types of decisions are subject to review under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321, and the policy of environmental protection underlying SEPA is "far stronger" than that behind NEPA. Majority at 71-72, 71 n.10; *ASARCO Inc. v. Air Quality Coalition*, 92 Wash.2d 685, 709, 601 P.2d 501 (1979) (citing *Leschi Improvement Council v. Washington State Highway Comm'n*, 84 Wash.2d 271, 279-80, 525 P.2d 774, 804 P.2d 1 (1974)). It seems redundant, therefore, for the trial court to reconsider its wholly correct legal conclusion that the "legal or equitable right" prong of *Tyler Pipe* is satisfied.

The majority further states that respondents must demonstrate their lack of a remedy at law in order for an injunction to issue under SEPA. While I agree that prior to issuance of an injunction this determination should be made, this should not prove difficult because the essence of a SEPA claim is harm to the environment. RCW 43.21C.010(2); RCW 43.21C.020; ASARCO Inc., 92 Wash.2d at 707, 601 P.2d 501; Eastlake Community Council v. Roanoke Assocs., Inc., 82 Wash.2d 475, 490, 513 P.2d 36, 76 A.L.R.3d 360 (1973); see also Sierra Club v. Marsh, 872 F.2d 497, 500-01, 504 (1st Cir.1989) (harm at stake under NEPA claim is harm to the environment). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco Prod. Co. v. Village of Gambell, Alaska, 480 U.S. 531, 545, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987).

The uniqueness of environmental actions in this regard is frequently recognized by federal courts in their analysis of injunctive relief under NEPA. See <u>Forest Conservation Council v. United States Forest Serv.</u>, 66 F.3d 1489, 1496 (9th Cir.1995); *228City of S. Pasadena v. Slater, 56 F.Supp.2d 1106, 1142-43 (C.D.Cal.1999); <u>Hells Canyon Preservation Council v. Jacoby</u>, 9 F.Supp.2d 1216, 1245 (D.Or.1998). For example, in *Forest Conservation Council*, the Ninth Circuit explained that while a violation of NEPA does not per se mandate the issuance of an injunction, equitable relief is the appropriate remedy absent "unusual circumstances." <u>Forest Conservation Council</u>, 66 F.3d at 1496 (citing <u>Amoco Prod. Co.</u>, 480 U.S. at 541, 544-45, 107 S.Ct. 1396; <u>Thomas v. Peterson</u>, 753 F.2d 754, 764 (9th Cir.1985); <u>Alpine Lakes Protection Soc'y v. Schlapfer</u>, 518 F.2d 1089, 1090 (9th Cir.1975)).

This analysis is even more compelling in the context of SEPA, because our Legislature has recognized that "each person has a fundamental and inalienable right to a healthful environment...." RCW 43.21C.020(3). As one commentator has noted:

A damages remedy under SEPA is by no means pre-ordained. The critical features of SEPA strive for protection and enhancement, goals realizable through injunctive**78 orders. SEPA treats environmental assets as something unique not simple items of trade covered comfortably by exchanges of dollars through the liability system. *The emphasis is upon stemming the losses not calculating payoffs*.

William H. Rodgers, Jr., *The Washington Environmental Policy Act*, 60 Wash. L.Rev. 33, 65 (1984-1985) (emphasis added). The language of SEPA displays a clear intent to protect *public* and as well as private interests. RCW 43.21C.010(1); RCW 43.21C.020(3); *see also* Rodgers, 60 Wash. L.Rev. at 65 (discussing anomaly of "private damages remedy for the loss of what are often very public assets..."). It is difficult to conceive of a legal remedy that could be "adequate" when a violation of SEPA harms public assets. *State v. Ralph Williams' N.W. Chrysler Plymouth*, *Inc.*, 87 Wash.2d 298, 311, 553 P.2d 423 (1976) (remedy at law must be adequate to defeat issuance of injunction).

In sum, I agree with the majority's remand of this case for consideration of the $Tyler\ Pipe$ factors the trial court *229 failed to expressly examine. FNI I also agree that the traditional equitable

analysis calls for examination of whether an adequate remedy at law exists, although presumably such a remedy will almost never be "adequate" under SEPA.

<u>FN1.</u> The trial court's examination of whether SEPA applies, however, may require little more than a recitation of the majority opinion's analysis.

BRIDGE, J., concurs. Wash.,2000. Kucera v. State, Dept. of Transp. 140 Wash.2d 200, 995 P.2d 63, 50 ERC 1464

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Supreme Court of Washington, En Banc. Louis ROUSSO, Petitioner,

V.

Victor A. MEYERS, Secretary of State, and Homer W. Humiston, Respondents. **No. 37199.**

March 26, 1964. Rehearing Denied May 27, 1964.

Action to restrain the Secretary of State and others from placing a referendum on the general election ballot. To review a judgment of the Trial Court, Thurston County, Charles T. Wright, J., dismissing the action, the plaintiff brought certiorari. The Supreme Court, Rosellini, J., held that where referendum petitions were stolen from office of Secretary of State, the impossibility of performance removed necessity of following statutory procedural steps when there was before Secretary sufficient evidence to justify ascertainment that petition contained required number of valid signatures.

Affirmed.

Donworth, J., dissented.

West Headnotes

[1] Statutes 361 \$\iii 355\$

361 Statutes

361X Referendum

<u>361k355</u> k. Determination of Sufficiency and Certification Thereof. <u>Most Cited Cases</u> Where referendum petitions were stolen from office of Secretary of State, the impossibility of performance removed necessity of following statutory procedural steps when there was before Secretary sufficient evidence to justify ascertainment that petition contained required number of valid signatures. <u>RCWA 29.79.220-29.79.240</u>, <u>29.79.450-29.79.470</u>; <u>Const. art. 2</u>, § 1 as amended Amend. 7.

[2] Statutes 361 \$\iii 342

361 Statutes

361X Referendum

361k342 k. Constitutional and Statutory Provisions. Most Cited Cases

The constitutional provisions which preserve the right of referendum are to be liberally construed to the end that the right may be facilitated, and not hampered by technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in exercise by the people of such constitutional right. Const. art. 2, § 1 as amended, Amend. 7(b, d)

*54 **558 William S. Howard, Morrissey & Hedrick, John E. Hedrick, Seattle, for petitioner.

Stouffer, Brown & Knight, William L. Brown, Jr., Tacoma, John J. O'Connell, Atty. Gen., Robert Doran, Philip H. Austin, Asst. Atty. Gen., Olympia, for respondent.

ROSELLINI, Judge.

The petitioner instituted this action to restrain the Secretary of State and others acting under him from placing referendum measure No. 34 on the November 3, 1964, general election ballot. Dr. Homer W. Humiston, proponent of the measure, intervened as a respondent.*55 The trial court granted the respondents' motion for summary judgment, dismissing the action, and the petitioner applied for and obtained a writ of certiorari.

Amendment 7, Art. 2, § 1, of the Washington constitution provides:

'The legislative authority of the state of Washington shall be vested in the legislature, * * * but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the legislature.

'**

- '(b) * * * The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, hearlth or safety, support of the state government and its existing public institutions, either by petition signed by the required percentage of the legal voters, or by the legislature as other bills are enacted. * * *
- '(d) * * * Referendum petitions against measures passed by the legislature shall be filed with the secretary of state not later than ninety days after the final adjournment of the session of the legislature which passed the measure on which the referendum is demanded. * * * All such petitions shall be filed with the secretary of state, who shall be guided by the general laws in submitting the same to the people until additional legislation shall especially provide therefor. This section is selfexecuting, but legislation may be enacted especially to facilitate its operation.'

Amendment 30 changes the number of signatures required upon petitions for initiative or referendum measures.

In accordance with the authorization contained in amendment 7, the legislature has provided certain procedural steps to be followed in obtaining a referendum. These steps are set forth in RCW chapter 29.79. RCW 29.79.120 provides that, when a specified number of signatures of legal voters has been obtained, a petition may be submitted to the Secretary of State for filing; and RCW 29.79.140 requires*56 that the petitions be filed not later than ninety days after the final adjournment of the session of the legislature which passed the act. Other provisions pertinent to this action are:

RCW 29.79.190 'If the secretary of state accepts and files an initiative or referendum petition upon its being submitted for filing * * * he shall forthwith * * * detach the sheets containing the signatures and cause them all to be firmly attached to one or more printed copies of the proposed initiative or referendum measure in such volumes as will be most convenient for canvassing and filing, and shall number such volumes and file the same and stamp on each thereof the date of filing.'

**559 RCW 29.79.200 'Upon filing the volumes of an initiative petition proposing a measure for submission to the legislature at its next regular session, the secretary of state shall forthwith in the presence of at least one person representing the advocates and one person representing the opponents of the proposed measure, should either desire to be present, proceed to canvass and count the names of the registered voters thereon. If he finds the same name signed to more than one petition he shall reject the name as often as it appears. * * *

RCW 29.79.220 'Upon filing the volumes of a referendum petition or an initiative petition for submission of a measure to the people, the secretary of state shall canvass the names of the petition within sixty days after filing and like proceedings shall and may be had thereon as provided in RCW 29.79.200 and 29.79.210.'

<u>RCW 29.79.230</u> 'If a referendum or initiative petition for submission of a measure to the people is found sufficient, the secretary of state shall * * * certify to each county auditor the serial numbers and ballot titles of the several initiative and referendum measures to be voted upon at the next ensuing general election or special election ordered by the legislature.'

<u>RCW 29.79.240</u> 'The secretary of state shall, while making the canvass, keep a record of all names appearing on an initiative or referendum petition which are not registered voters and of all names appearing thereon more than once, and shall report the same to the prosecuting attorneys of the respective counties where the names were signed to the end that prosecutions may be had for such violations of this chapter.'

*57 The legislature enacted Laws of 1963, chapter 37, which is entitled:

'AN ACT Relating to the maintenance and operation of certain machines or mechanical devices, salesboards, bingo equipment and cardrooms in certain governmental subdivisions; adding new sections to chapter 249, Laws of 1909 and chapter 9.47 RCW; and declaring an emergency.'

The emergency clause was declared invalid by this court in State ex rel. Humiston v. Meyers, 61 Wash.2d 772, 380 P.2d 735. On the day this decision was published, the respondent Humiston filed the papers necessary to initiate a referendum action against chapter 37, and the Secretary of State thereafter identified such filing as referendum measure No. 34. The Attorney General issued an official ballot title, and thereafter petition sheets bearing signatures of purported registered voters were filed with the Secretary of State. The 90 days within which such petition sheets could be filed expired on June 12, 1963. On June 17, 1963, the permanent registration division staff completed the following procedural steps:

- 1. Sorted the petition sheets by counties in which the majority of signers resided;
- 2. Bound 137 volumes of petition sheets, each volume containing approximately 40 sheets;
- 3. Numbered each page of each volume and numbered each volume;
- 4. Counted the signatures appearing upon each page and posted the total at the bottom of each page;
- 5. Posted the total number of signatures contained in each volume upon the cover of each volume;
- 6. Established that a grand total of 82,955 signatures had been filed and contained in a total of 137 volumes. A letter was written to Dr. Humiston advising him that the Secretary of State's office count revealed that the grand total of 82,955 signatures had been filed and that the canvass of the signatures would start on July 1, 1963. Accompanying this letter was a report of the Secretary of State's count of signatures showing how many signatures came from each *58 county and the number of volumes representing each county.

**560 On June 21, 1963, as a final procedural step before the actual canvass of signatures was to be made, an employee carefully checked every signature on each page and in each volume for situations beyond the evaluation of temporary checks. As a result of this procedure, it was found that a total of forty-five names were compounded, that is, in forty-five instances, one person had signed for two or more persons, for example, 'Mr. and Mrs. Sam Jones.' A check of these compounded signatures revealed that in each instance, one of the named persons had actually signed the compounded signature; and each of these was counted as one signature.

On June 24, 1963, the theft of the 137 volumes containing all of the signature petition sheets supporting referendum measure No. 34, was discovered. Two days later the Secretary of State certified the measure to the November 3, 1964, state general election ballot, and this action followed.

The superior court determined that the Secretary of State had made his certification upon sufficient evidence and refused to disturb his action. The petitioner now asks this court to hold that, inasmuch as the Secretary of State did not comply with the provisions of <u>RCW 29.79.220</u>, 29.79.230, and 29.79.240, quoted above, his certification was invalid.

It is agreed by all concerned that this is a case of first impression, the diligent research of counsel having failed to disclose any case in history wherein a court was asked to determine whether an attempt to obtain a referendum or initiative can be frustrated by the theft of the petitions.

Each party maintains that the court should sustain his position as a matter of public policy, contending that to do otherwise would be to encourage future thefts of voters' petitions. We

cannot assume that so gross an outrage to the rights and dignity of the people of this state will ever be repeated, and our decision will not be made to rest upon such a supposition.

The question presented is whether impossibility of performance removed the necessity of following the statutory procedural steps, when there was before the Secretary *59 of State sufficient evidence to justify an ascertainment by him that the petition contained the required number of valid signatures. The evidence showed, and the trial court found, that, in making its determination, the Secretary of State took into consideration three pertinent factors:

- (1) He considered that an inference of validity should be drawn in view of the fact that the law imposes criminal sanctions upon one who signs a false name (<u>RCW 29.79.440</u>), or signs more than one petition sheet (<u>RCW 29.79.450</u>), or signs when he is not a legal voter (RCW 29.79.460), or makes a false statement as to his residence (<u>RCW 29.79.470</u>). A warning of these sanctions appears on each petition sheet.
- (2) The records and files in his office of past referendum petitions indicated beyond a reasonable doubt that the petitions contained a sufficient number of legal signatures. (The minimum number of signatures required by law was 48,630; the unofficial count showed that the petition contained 82,955 signatures. In the past the highest rejection rate had been 20.21 per cent, and these petitions could have survived had 41.37 per cent of the signatures been rejected.)
- (3) No irregularities were discovered during the processing of the petition sheets.
- [1] We deem these factors, when taken all together, sufficient to justify the determination made by the Secretary of State. However, the petitioner cites the case of <u>State ex rel. Evich v. Superior Court</u>, 188 Wash. 19, 61 P.2d 143, and contends that the decision of that case is controlling here.

In that case, petitions for an initiative measure were submitted to the Secretary of State, who certified the measure to the legislature without having completed the canvassing of signatures. The number of valid signatures canvassed was not sufficient to validate the petition, although a preliminary**561 canvass had indicated that there were in excess of 90,000 signatures on the petition sheets. The Senate and the House of Representatives, by resolutions, expunged the measure from their records for the reason that it had been improperly and illegally certified, and returned it to the Secretary of State. The relator alleged that, *60 notwithstanding these facts, the Secretary of State threatened that he would, unless restrained, certify the measure to the county auditors to be placed upon the ballot to be voted upon at the next election.

This court quoted the initiative provisions of amendment 7, Art. 2, § 1, referred to the fact that the section is self-executing but authorizes legislation to facilitate its execution, and observed that such facilitating legislation had been enacted. This legislation embodied essentially the procedure which the Secretary of State was unable to follow in this case. We granted the relief asked by the petitioner, holding that the Secretary of State had illegally certified the measure to the county auditors. In reaching this decision, we noted that the partial canvass undertaken by him had indicated that the petition sheets did not contain the requisite number of valid signatures.

The case is distinguishable from this, of course, for there was no contention made in that case that the canvassing of the signatures had been rendered impossible by the act of a third party. The statute was applicable under the circumstances. Here the legislature, in providing a procedure for the determination of the question whether a sufficient number of signatures has been obtained, did not take into account the possibility that referendum petitions might be purloined. There is thus a hiatus in the statute.

[2] Those provisions of the constitution which preserve the right of referendum are to be liberally construed to the end that this right may be facilitated, and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right. State ex rel. Case v. Superior Court, 81 Wash. 623, 143 P. 461; State ex rel. Howell v. Superior Court, 97 Wash. 569, 166 P. 1126.

Furthermore, amendment 7 declares that its provisions are self-executing, but that legislation may be enacted especially to facilitate its operation. In the case before us, there is no legislation which facilitates the operation of the constitutional provision. The circumstances *61 being as they are, the Secretary of State has found himself without a statutory guide; and the constitution itself sets forth no procedure to be followed in ascertaining whether the required percentage of legal voters has signed.

We have no doubt that the Secretary of State would consider it his duty to canvass the signatures in every case, even though no statute required it, but in this case he was called upon to make a decision without the benefit of the exact knowledge which a canvass would reveal. If the correctness of the decision which he made were in any doubt, or if there were a suggestion of fraud or mistake on the part of the proponents, we would hesitate to uphold that decision. But we think, in view of the fact that the evidence supporting the decision was undisputed and overwhelming, and there is no element of fraud or mistake involved, the intent and purpose of the framers of the constitution, in reserving the power of referendum, can be given effect only if his decision is sustained.

The judgment is affirmed.

OTT, C. J., and FINLEY, HUNTER, HAMILTON and HALE, JJ., concur. WEAVER, Judge (concurring in the result).

The majority opinion paints with a brush slightly wider than I would use. I agree, therefore, only in the result reached by the majority opinion, for I seem to sense a veiled conclusion that since there is a hiatus in the statute, it becomes the function of the judiciary to fill the void. I challenge the validity of this thesis.

**562 My thoughts are so well expressed in a recent address of Mr. Justice Harlan of the United States Supreme Court that I quote extensively from his remarks. FNI

FN1. Address delivered at the American Bar Center August 13, 1963. Published in 86 New Jersey Law Journal 505 (September 19, 1963); 49 American Bar Association

Journal 943 (No. 10; October, 1963).

'One of the current notions that holds subtle capacity for serious mischief is a view of the judicial function that seems increasingly coming into vogue. This is that all deficiencies in our society which have failed of correction by *62 other means should find a cure in the courts. The principal theme of these remarks will be to challenge the validity of * * * an urge for quick and uncompromising panaceas for things that call for reform. I venture to say at the outset that this view of the cosmic place of the judiciary is not only inconsistent with the principles of American democratic society but ultimately threatens the integrity of the judicial system itself.

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'* * some well-meaning people apparently believe that the judicial rather than the political process is more likely to breed better solutions of pressing or thorny problems. This is a compliment to the judiciary but untrue to democratic principle. That point of view is some times difficult for judges to resist for it carries ostensibly authentic judicial hallmarks-the function of statutory construction and the power of judicial review. If the Congress or a state legislature has passed an inadequate statute why should it not be revised by judicial construction? If the statute is one that is manifestly unwise, harsh, or out-of-date, why should it not be abrogated by the exercise of the power of judicial review? * * *

'The objections to such alluring but deceptive plausibilities are more deepseated than might appear at first blush. For in the end what would eventuate would be a substantial transfer of legislative power to the courts. A function more ill-suited to judges can hardly be imagined, situated as they are, and should be, aloof from the political arena and beholden to no one for their conscientious conduct. Such a course would also denigrate the legislative process, since it would tend to relieve legislators from having to account to the electorate. The outcome would inevitably be a lessening, on the one hand, of judicial independence and, on the other, of legislative responsibility, thus polluting the blood stream of our system of government. We should be on guard against any such deliberate or unwitting folly.

'The late Speaker of the House Sam Rayburn once observed that 'one of the greatest statements that was ever made by anybody was: 'Just a minute." * * * A judicial decision which is founded simply on the impulse that 'something should be done' or which looks no further than to the 'justice' or 'injustice' of a particular case is not likely to have lasting influence. * * * Our scheme of ordered liberty is based, like the common law, on enlightened and uniformly applied legal principle, not on *ad hoc* notions of what is right or wrong in a particular case. The stability *63 and flexibility that our constitutional system at once possesses is largely due to our having carried over into constitutional adjudication the common-law approach to legal development.'

I cannot agree with the statement in the majority opinion that

'* * We cannot assume that so gross an outrage to the rights and dignity of the people of this state will ever be repeated, * * *.'

**563 It is not our function to make or deny such an assumption. A repeat performance of that which has happened is always a possibility. 'Those who cannot remember the past are condemned to repeat it.'

Nor can I agree with the rationale of the dissent. If used as judicial precedent it might well place a premium upon incompetence and malfeasance.

My concurrence in the result is based upon this: The factual impossibility of the Secretary of State to comply with the statutes does not, ipso facto, render the constitutional provision nugatory.

In 1912, when amendment 7 was adopted, there were those who opposed legislation by initiative and referendum. A careful reading of the entire amendment discloses a particularity of method that leaves no doubt about the purpose and intent of the proponents of the system. The amendment was not to become an unenforceable provision of the constitution (illustrated by Const. Art. 2, § 3), dependent upon the whim of the legislature. It provides that the Secretary of State

"* * * shall be guided by the general laws in submitting the same [initiative or referendum measures] to the people until additional legislation shall especially provide therefor. This section is self-executing, but legislation may be enacted especially to facilitate its operation.' (Italics mine.)

The efficacy of amendment 7 does not depend upon its implementation by the legislature. As the trial court said: 'The statutes are effective only insofar as they facilitate the action of the self-executing constitutional provisions.'

*64 The factual pattern of the instant case is bizarre and fantastic. We are in the same position this court would have been in had the legislature refused to pass implementing legislation.

The reasons advanced by the Secretary of State in support of his certification are, I believe, sufficient in the *instant case* to support the trial court's conclusion; but the decision is *sui generis* and should not, to my mind, be considered as judicial precedent necessarily applicable to an analogous situation.

HILL, J., concurs in Judge WEAVER'S concurring opinion. HILL, Judge (concurring specially). While I have signed Judge WEAVER'S concurring opinion, it seems to me that an analysis of the Initiative and Referendum Amendments (7, 26, 30, and 36) and our statutes should be made to indicate where changes or additions are necessary, at least so far as referendums are concerned.

When a referendum petition has been accepted by the Secretary of State within the 90 days after the legislature has adjourned, it seems clear that the operation of the measure to be referred must be suspended.

<u>FN1.</u> 'The time for submitting initiative or referendum petitions to the secretary of state for filing is as follows:

'(1) A referendum petition ordering and directing that the whole or some part or parts of an act passed by the legislature be referred to the people for their approval or rejection at the next ensuing general election or a special election ordered by the legislature, must be submitted not more than ninety days affter the final adjournment of the session of the legislature which passed the act;' RCW 29.79.140(1) (Const. Art. 2, § 1 (amendment 7(d))

The period of the suspension is clear in only one of the numerous contingencies to which references are hereinafter made, i. e., if at the election the measure is approved by a majority of the votes cast thereon and if the total vote cast on such measure equals one-third of the total votes cast at such election, the measure goes into effect on and after the 30th day after said election. This is what the constitution says, FN2 and this **564 court, in *65Wynand v. Department of Labor and Industries (1944), 21 Wash.2d 805, 809, 153 P.2d 302, rejected the suggestion that on approval by the people it became effective as of date on which it would have been effective if there had been no referendum.

<u>FN2.</u> '* * * Any measure initiated by the people or referred to the people as herein provided shall take effect and become the law if it is approved by a majority of the votes cast thereon: Provided, That the vote cast upon such question or measure shall equal one-third of the total votes cast at such election and not otherwise. Such measure shall be in operation on and after the thirtieth day after the election at which it is approved. * * * '(Const. Art. 2, § 1 (amendment 7(d))

The contingencies which involve the period of suspension are listed herewith so that, if clarification is deemed necessary by further amendment or legislation, it can be done all at one time and not piecemeal.

A. The referendum petition may be found to lack sufficient valid signatures (presumably within the 60 days after filing allowed the Secretary of State for canvassing, ^{FN3} and the additional time for reviews by the superior and supreme courts ^{FN4}).

<u>FN3.</u> 'Upon filing the volumes of a referendum petition or an initiative petition for submission of a measure to the people, the secretary of state shall canvass the names of the petition within sixty days after filing and like proceedings shall and may be had there on as provided in <u>RCW 29.79.200</u> and <u>29.79.210</u>.' <u>RCW 29.79.220</u>

<u>FN4.</u> 'Any citizen dissatisfied with the determination of the secretary of state that an initiative or referendum petition contains or does not contain the requisite number of signatures of registered voters may, within five days after such determination, apply to the superior court of Thurston county for a citation requiring the secretary of state to submit the petition to said court for examination, and for a writ of mandate compelling the certification of the measure and petition, or for an injunction to prevent the

certification thereof to the legislature, as the case may be. Such application and all proceedings had thereunder shall take precedence over other cases and shall be speedily heard and determined.

'The decision of the superior court granting or refusing to grant the writ of mandate or injunction may be reviewed by the supreme court on a writ of certiorari sued out within five days after the decision of the superior court, and if the supreme court decides that a writ of mandate or injunction, as the case may be, should issue, it shall issue the writ directed to the secretary of state; otherwise, it shall dismiss the proceedings. The clerk of the supreme court shall forthwith notify the secretary of state of the decision of the supreme court.' RCW 29.79.210

*66 QUAERE: When does the measure become effective, there being no valid referendum?

- B. The referendum petitions being stolen, lost or destroyed before the signatures are checked.
- 1. The Secretary of State certifies that there were sufficient valid signatures. This is the present case, and whether the measure ever becomes effective will be determined under C and D.
- 2. The Secretary of State certifies that there were not sufficient signatures.

QUAERE: What happens and when does the measure become effective?

3. The Secretary of State certifies that he cannot tell whether there were sufficient signatures.

QUAERE: What happens; does the measure become effective, and when?

- C. The referendum, having gone to a vote and the votes cast on such measure equaling one-third of the total votes cast at such election.
- 1. A majority approves the measure; it becomes effective on and after 30 days after the election.
- 2. A majority disapproves the measure; it never goes into effect.
- D. The referendum having gone to a vote and the votes cast on such measure not equaling one-third of the total votes cast at such election.
- 1. A majority approves the measure.

QUAERE: Does it become effective?

The language of the constitution would indicate that it does not become effective. We have, in such a situation, an act passed **565 by the legislature and approved by a majority of those who voted on it and, yet, the result is the same as though a majority had voted against it under the C-2 situation. We can but wonder whether the proviso should be applicable to referendums.

2. A majority disapproves the measure. (Actually, there is no difference in result between D-1 and D-2.)

Attempting to speak for no one but myself, it would seem that under our present constitutional provisions a referendum*67 petition having been filed by the Secretary of State, the operation of the measure sought to be referred remains suspended until either A, supra (it is determined that the petitions lack adequate voter signatures), or C-1, supra, a majority of the voters approve the measure. (The votes cast on the measure equalizing one-third of the total votes cast at the election.)

FINLEY, Judge (concurring specially).

Despite its three-alarm context and the high decibel rating of the dissent, and despite other legal argumentation contrary to the majority, I have signed that opinion. It presents in my judgment a basically acceptable rationalization of the jurisprudential problem involved in this appeal. In other words, proceeding ever so slightly from the general to the particular, and perhaps elaborating the obvious briefly, I think the decision is a sound, necessary, and proper one. It is decided ont he particular facts of this particular case; furthermore, in terms of probabilities, it seems to me quite likely this decision is *sui qeneris*.

The foregoing should and would end the matter for me, except that I am concerned about some possible loose ends or inferences generated by some things said, and others perhaps unsaid, in the opinions written in the disposition of this appeal.

The opinion written for the majority by Judge Rosellini states that there is a hiatus in the legislation enacted to implement the referendum provisions of the state constitution. It is implied that the legislature should have provided some alternative and practical formula for the Secretary of State to follow in certifying as to the number of voters' signatures and the legal efficacy of referendum petitions filed with the Secretary of State, but subsequently stolen, as in the instant case, prior to completion of the mechanical process of counting and canvassing.

The majority opinion in effect concludes that the courts will not permit such a legislative omission or hiatus to negative or defeat the self-executing referendum provisions of the state constitution. This is interpreted in the opinion *68 by Judge WEAVER (concurring in the result) as a statement by the majority that this court can and will fill the legislative void or hiatus. Judge WEAVER (apparently joined by Judge HILL) takes very strong exception to the suggestion of such a possibility; but, on the other hand, concurring in the result reached by the majority, states without hesitation:

'My concurrence in the result is based upon this: The factual impossibility of the Secretary of State to comply with the statutes does not, ipso facto, render the constitutional provision nugatory.

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'The reasons advanced by the Secretary of State in support of his certification are, I believe,

sufficient in the *instant case* to support the trial court's conclusion; but the decision is *sui generis* and should not, to my mind, be considered as judicial precedent necessarily applicable to an analogous situation.'

In other words, WEAVER, J., in effect, seems to be saying that the referendum petitions have been stolen; it is in fact impossible for the Secretary of State to comply explicitly with the canvassing, counting and certification requirements of the existing statutes respecting referendum petition No. 34. But the clear and inescapable inference is that, under the circumstances, the Secretary of State does not have to **566 comply explicitly with the existing statutory provisions, and a conclusion is articulated that the certification as made by the Secretary of State is sufficient. The opinion adds that the conclusion reached should and must be limited to the particular facts in this particular case. Whether articulated or not, this is, of course, the applicable legal theory inherent in the now well recognized and accepted doctrine of *stare decisis*. Such a limiting statement is good sound judicial orthodoxy and caution, certainly in terms of the more popular forms of judicial discourse employed in just about any case; and I have also taken the precaution to assert this sound principle in the opening paragraph herein.

But the point is, or it seems so to me, that WEAVER, J., is saying precisely the same thing as ROSELLINI, J., but in *69 slightly different language. Judge ROSELLINI'S statement emphasizes or relates to the inadequacy or absence of specific legislation to authorize or justify the action taken by the Secretary of State, certifying referendum No. 34 in the instant case. Judge WEAVER'S statement emphasizes or relates to the fact that the petitions are no longer extant, and that the Secretary of State, consequently, cannot comply with the existing statutes; and it is thereupon concluded or decided that the courts should not permit this to defeat the people's right to referendum under the pertinent state constitutional provisions. Neither approach nor opinion mentions, but both suggest, a possible application of the concept of substantial compliance relating to the certification action by the Secretary of State and the existing statutory requirements. Both opinions, obviously, reach an identical conclusion-that the trial court and this court should not exercise judicial discretion, interfering with the enjoining the action of the Secretary of State in certifying as to the legal adequacy of the referendum petitions. So, not only is the end result the same, but the reasoning and legal argumentation or characterization employed seem no more to me than a description of two sides of the same coin, the praiseful comment, citation and quoting of Mr. Justice Harlan to the contrary notwithstanding.

In the latter connection I am tempted to confess some disenchantment with the glittering generalities of the Harlan quotation, and to observe that its last sentence seems to me inconsistent with much of the rest of the quotation, and with other portions of this ostensibly significant opus. The last sentence of the quotation reads:

"* * The stability and flexibility that our constitutional system at once possesses is largely due to our having carried over into constitutional adjudication the common-law approach to legal development."

First, this sentence is a recognition of at least some inconsistency or opposing dynamics in the terms *stability* and *flexibility* when considered as working legal concepts, judicial touchstones, or

constitutional qualities and characteristics. The sentence, in or out of context, is reminiscent *70 of Pound's, admittedly paradoxical but perhaps more forthright, statement that the law must be stable, yet it cannot stand still. It suggests the philosophical problem posed in the statement by Alfred North Whitehead that 'The art of progress is to preserve order amid change and to preserve change amid order,' which could be applied or paraphrased to describe the nature of the judicial process, I think. Certainly, the Harlan comment about carrying over into constitutional adjudication the common-law approach to legal development seems to fall somewhat short of possible expectations. It does not analytically depreciate anything said in the majority opinion in the instant case; that is, if we are conscious of the real significance of the common-law approach and its methodology in the evolution and development of the law. FNI

FN1. Llewellyn, Karl N. The Common Law Tradition. Boston, Little, Brown. 1960.

In conclusion, I will go back to my original statement. Despite the dissent and other**567 legal argumentation contrary to the majority, I have signed that opinion because, basically, in my judgment, it is sound, necessary and proper in terms of judicial thinking and action. I reiterate; I also think the problem presented by this appeal is *sui generis*.

DONWORTH, Judge (dissenting).

I am unable to agree with the majority opinion for reasons stated below. Basically my disagreement is bottomed on the proposition that courts cannot supply omissions in legislation by reading into an act provisions which the legislature might have included therein but omitted. In this case, if the legislature had anticipated the possibility of a theft of the referendum petitions, it might have made some provision for dealing with the problem.

The opinion of those judges concurring in the result, as I read it, is in accord with my position, but agrees with the majority's result only because it holds that their decision is *sui generis* and should not be considered necessarily as a judicial precedent. I am in disagreement with that holding for reasons stated later.

*71 I heartily agree with the remarks of Mr. Justice HARLAN (quoted in the concurring opinion), but believe that his ideas about the limitations of the judicial function apply to constitutional provisions as well as to statutes. FNI Therefore, in the latter portion of this dissent, I discuss the impact of the provision in Art. 2, § 1 (as amended) which states:

<u>FN1.</u> Since the foregoing sentence was written, Mr. Justice Harlan has filed a dissenting opinion in the case of <u>Wesberry v. Sanders, 84 S.Ct. 526 (decided February 17, 1964)</u> in which the majority held that the present apportionment of members of the House of Representatives was violative of the United States Constitution. The concluding three paragrphs of Justice Harlan's dissent are, in my opinion, applicable to the problem now before this court. I quote them in full:

'Today's decision has portents for our society and the Court itself which should be recognized. This is not a case in which the Court vindicates the kind of individual rights that are assured by the Due Process Clause of the Fourteenth Amendment, whose 'vague

contours,' Rochin v. People of [State of] California, 342 U.S. 165, 170, 72 S.Ct. 205, 208, 96 L.Ed. 183, of course leave much room for constitutional developments necessitated by changing conditions in a dynamic society. Nor is this a case in which an emergent set of facts requires the Court to frame new principles to protect recognized constitutional rights. The claim for judicial relief in this case strikes at one of the fundamental doctrines of our system of government, the separation of powers. In upholding that claim, the Court attempts to effect reforms in a field which the Constitution, as plainly as can be, has committed exclusively to the political process.

'This Court, no less than all other branches of the Government, is bound by the Constitution. The Constitution does not confer on the Court blanket authority to step into every situation where the political branch may be thought to have fallen short. The stability of this institution ultimately depends not only upon its being alert to keep the other branches of government within constitutional bounds but equally upon recognition of the limitations on the Court's own functions in the constitutional system.

'What is done today saps the political process. The promise of judicial intervention in matters of this sort cannot but encourage popular inertia in efforts for political reform through the political process, with the inevitable result that the process is itself weakened. By yielding to the demand for a judicial remedy in this instance, the Court in my view does a disservice both to itself and to the broader values of our system of government.'

'This section is self-executing, but legislation may be enacted especially to facilitate its operation.'

The majority hold that, since the theft of the petitions made compliance by the Secretary of State with the constitutional*72 and statutory provisions relating to the canvassing of the signatures on the referendum petitions impossible, this court can excuse the Secretary of State from compliance therewith and approve the issuance of his certificate of the measure (Referendum No. 34) placing it on the ballot at the next **568 general election. This was done even though the affidavits filed on behalf of respondents conclusively prove that there was *no* canvass of the signatures on the petitions whatever.

In order to test the validity of the majority's conclusion, I think that the vital provisions of the constitution and applicable statutes (most of which are quoted in the majority opinion) should be pinpointed.

Amendment 7 to the state constitution providing for the second power reserved by the people (the referendum) contains this sentence:

'This section [Art. 2, § 1, subd. (d)] is self-executing, but legislation may be enacted especially to facilitate its operation.'

Amendment 7 was adopted by the people in 1912, and the legislature, in 1913, in accordance with the above-quoted authorization, enacted what is now RCW chapter 29.79. Later the

electorate, through the approval of an initiative measure, enacted the permanent registration act (RCW 29.07).

<u>RCW 29.79.200</u> makes it the duty of the Secretary of State to forthwith canvass and count the names of the registered voters on initiative petitions filed with him.

<u>RCW 29.79.220</u> makes it his duty, whenever a referendum or an initiative petition is filed with him, to canvass the names on the petition within sixty days, and states that 'like proceedings shall and may be had thereon as provided in' RCW 29.79.200 and 29.79.210.

RCW 29.79.230 provides:

'If a referendum or initiative petition for submission of a neasure to the people is found sufficient, the secretary of state shall * * * certify to each county auditor * * *.'

that it shall be voted upon by the people at the next general election.

*73 The words 'found sufficient' in the section last referred to must be construed in connection with the provisions in the permanent registration act (RCW 29.07.090 and 29.07.130), which read as follows:

'At the time of registering any voter, each registration officer shall require him to sign his name upon a third card upon which the rigistrar has entered his surname followed by his given name or names and the name of the county and city or town, with post office and street address, and the name or number of the precinct, in which the voter is registered.' <u>RCW 29.07.090</u>.

'The third cards shall be kept on file in the office of the secretary of state in such manner as will be most convenient for, and for the sole purpose of, checking initiative and referendum petitions and mailing pamphlets required for constitutional amendments and by the initiative and referendum procedure. They shall not be open to public inspection or be used for any other purpose.' RCW 29.07.130.

These two acts (RCW 29.79 and 29.07) are in pari materia and were enacted pursuant to Art. 2, § 1, subd. (d) of the constitution 'to facilitate its operation.'

In <u>State ex rel. Evich v. Superior Court, 188 Wash. 19, 61 P.2d 143 (1936)</u>, we discussed the effect of the permanent registration act, saying:

'By the terms of § 13 of the permanent registration law adopted by the people at the November election in 1932 (chapter 1, Laws of 1933, p. 12, § 13), the voter, when registering with the local registration officer, is required to sign his name upon a card containing information necessary for his identification, and it is made the duty of the registrar of voters to transmit these cards to the secretary of state for filing in his office, together with a certificate that the cards so transmitted are the original cards filed by the voters whose names appear thereon, and that such voters are duly registered in the precincts and from the addresses shown. The cards provided for in this

section

**569 '* * * shall be kept on file in the office of the secretary of state, in such manner as will be most convenient for, and for the sole purpose of, checking initiative and referendum petitions and mailing pamphlets containing constitutional amendments and initiative and referendum measures and arguments for and against the same, and shall not be open to public inspection, or used for any other *74 purposes.' Rem.Rev.Stat. (Sup.), § 5114-13 [P.C. § 2321-2323].'

The only way that the Secretary of State can determine whether a referendum petition contains the number of valid signatures of legal voters equal to four per centum of the number of voters registered and voting for the office of Governor at the last preceding regular gubernatorial election (as required by amendment 30) is to compare the signatures on the petition with those on the voters' registration cards on file in the secretary's offic. Again, reference is made to the Evich case, where this court said, regarding the duties of the secretary:

'It will be noted, by reference to the certificate of the secretary of state, that he reported the number of signers from rural precincts that had been certified by the various registration officers, provision for such certification being then in force.

'Now, inquiring into the duty of the secretary of state under Rem.Rev.Stat. (Sup.), § 5411 [P.C. § 2764], we see that he is to 'proceed to canvass and count the names of legal voters * * * on such petition,' and if, at the conclusion of the canvass and count,

"* * * it shall appear that such petition bears the requisite number of names of legal voters, the secretary of state shall transmit a certified copy of such proposed measure to the legislature at the opening of its session together with a certificate of the facts relating to the filing of such petition and canvass thereof.'

'He is to ascertain the number of names of legal voters on the petition, and the standard manifestly is by comparison with the registration cards in his office certified to him by the local registration officers, in accordance with the provisions of § 13 of the permanent registration act, providing that these registration cards are deposited with him for the sole purpose of

"* * * checking initiative and referendum petitions, and mailing pamphlets containing constitutional amendments, initiative and referendum measures,' etc.

'That the secretary of state must compare the signatures on the petition, is further evidenced by Rem.Rev.Stat. (Sup.), § 5412 [P.C. § 2765], quoted above, requiring him to keep a record of all names appearing on the petition of persons not registered voters and report them to the prosecuting attorneys.

*75 'It is obvious that the respondent's certificate to the legislature did not comply with the requirement of the statute, nor, for that matter, with the provision of the constitution, which, while embodying no specific method for the ascertainment of the fact, requires signatures of the requisite number of legal voters upon the petition. Indeed, the certificate negatives any

suggestion of full compliance. * * *'

In the present case, the secretary counted only the total signatures from each county and added them together, which made a grand total of 82,955 signatures on the petitions, and advised the proponent by letter that canvass of the signatures would begin on July 1, 1963. (He also corrected 45 instances where a husband or wife had signed as Mr. and Mrs.) In his affidavit, the secretary stated that it was impossible for him to canvass the names on the petition forms because of the theft.

June 24, 1963, the theft of the petitions was discovered, and June 26, 1963, the Secretary of State certified the measure to the county auditors to be placed on the **570 ballot for the state general election to be held November 3, 1964.

In so doing, the evidence showed that the secretary, in certifying the measure without a canvass of the signatures, took into consideration three factors:

(1) The inference that the 82,955 signatures on the petitions are valid is drawn from the fact that it is a criminal offense to sign such a petition with a false name or residence address, or when not a legal voter, or to sign more than one petition sheet.

In my opinion, if the secretary's execution of his certificate is to be based on this inference, there would be no need for the legislature to require a canvass at all. Without comparing the signatures on the petitions with the signatures on the voters' registration cards, the secretary could simply make his certificate based on the assumption that a substantial number of the signers would not violate the applicable statutes because of fear of criminal prosecution. FN2

<u>FN2.</u> <u>State v. Patric, 63 Wash.2d 821, 389 P.2d 292 (1963)</u>, is the only case that has come before this court which involved an appeal from a judgment and sentence based on an alleged violation of <u>RCW 29.79.440-29.79.470</u>.

*76 Furthermore, the evidence shows that in one instance in the past 20.21 per cent of the signatures were rejected by the secretary for failure to comply with these statutes. Apparently, in that instance a substantial number of signers were not deterred from violating the law by the warning of criminal prosecution printed on the petitions.

(2) The second factor was the inference which the secretary deduced from his records in his office relating to previous referendum petitions. These show that the highest rejection rate was 20.21 per cent, but that, during the last 14 years, the average rejection rate has been 7.71 per cent of the signatures.

Using the vernacular, the secretary estimated, based on past experience, that 'the chances were' that the present petitions contained sufficient valid signatures (48,630 were needed), because it was unlikely that in this case more than 41.37 per cent were invalid. Unless this percentage were exceeded, the petition would have been valid *if* this fact had been legally determined as the result of a canvass.

If such 'guessing' were permissible, this might be a reasonable deduction, but, under the constitution and the statutes authorized thereby, the secretary's certificate cannot rest upon speculation, conjecture, or prognostications, but must be based on findings made by the secretary after a canvass of the signatures on the petitions.

(3) That no irregularities were discovered during the processing of the petitions is the last factor considered by the secretary. This fact is not surprising because the limited procedure which took place (as described above) would not disclose any irregularities except, for example, 'Mr. and Mrs.' signatures. The canvass was to begin on July 1 and, until that was completed, no one knew how many signatures would be found to be invalid.

The majority holds that the foregoing factors, when considered altogether, constituted sufficient evidence to justify the secretary, without canvassing the signatures on the petitions, to make his certificate which provides for the placement of referendum No. 34 on the ballot for the 1964 general election.

*77 I disagree for the following reasons:

1. There admittedly has been a failure to comply with the mandatory legislation which the constitution authorized the legislature to enact 'to facilitate' the operation of the Seventh Amendment (which amended Const. Art. 2, § 1). This amendment provided that this section is self-executing, but permitted legislation to be enacted especially to facilitate its operation.

Upon the adoption of the Seventh Amendment in 1912, and prior to the enactment of facilitating legislation, there was no prescribed manner in which any official was **571 required to determine whether a particular referendum petition was signed by the required percentage of legal voters, as prescribed by that amendment.

This void was filled by the legislature a few months later, acting pursuant to the authorization contained in the amendment to enact facilitating legislation. This provision is contained in RCW chapter 29.79, which requires that the Secretary of State *shall* canvass the names on the petition and, *if found sufficient*, he shall certify, etc.

It seems plain to me, on the face of the record in this case, that the secretary has admittedly failed (through no fault on his part) to canvass the signatures on the petition prior to making his certificate.

The majority state that there was sufficient evidence before the secretary to justify his certifying the referendum for the ballot because of the three factors (described above) upon which he relied. None of these indicated in the slightest degree, except by speculation, whether the required number of the 48,630 signatures on the petitions before him were those of registered voters. The facilitating legislation prescribes the manner in which this vital fact shall be determined by the secretary-the only legal method is by comparision of signatures.

The majority state that there is a hiatus in the statute because it does not provide what shall be done if the petitions are stolen before being canvassed. This is true. Neither is it provided in the statute what should be done if petitions are destroyed by fire, by an earthquake (such as we had *78 in April, 1949), by the blast of an atomic bomb, or by other act of God or the public enemy. All the statute states in facilitating the constitutional provision reserving to the people the right of referendum is that *the signatures shall be canvassed before* the measure shall be certified for the ballot.

It is further stated by the majority that the people's right of referendum reserved by the constitution should be liberally construed so that this right may be facilitated and not hampered by technical statutes or technical construction thereof. My answer is that the constitution gave the legislature the authority to provide how this right might be facilitated and the legislature has done so by saying to the Secretary of State: 'You canvass the voters' signatures on the petition before causing the measure to be placed on the ballot.'

I see nothing techical about this procedure. In my opinion, the statute requires no construction (technical or otherwise). Its wording is free from ambiguity. It is the majority that is seeking to change the mandatory statute's clear meaning by permitting the substitution of guess work for precision. The fact that the legislature did not anticipate the theft of the petitions and provide a new procedure in such case does not, in my opinion, justify a court in supplying, or condoning the use of, a substitute method to fill in the hiatus.

The majority attempt to distinguish the Evich case (quoted above) because in that case the failure of the secretary to canvass the signatures was not made impossible by the act of a third party, while in the present case it was so made impossible and the legislature did not specifically provide any procedure to be followed in such event.

I do not agree that this is a valid distinction. Since the constitutional amendment and the mandatory statutes enacted to implement and facilitate its operation provided for canvassing the signatures in all cases without exception, neither the secretary nor the courts may read into the statutes what they think the legislature might have provided *79 if it has had the present situation in mind when it was legislating on this subject.

In may opinion, there is no basis for holding, in effect, that there is or can be substantial compliance with a mandatory provision of the constitution or of the statutes enacted to facilitate the operation thereof. Such provisions must be complied with fully.

The rule applicable here is well stated by the Supreme Court of North Carolina in **572 State v. Patterson, 98 N.C. 660, at page 662, 4 S.E. 350, at page 351 (1887), as follows:

'More particularly, for the present purpose, when the constitution prescribes and directs in terms or by necessary implication, that a particular power shall be exercised in a specified way, or a particular thing shall be done by a particular coordinate branch of government, (as the legislature,) or by a particular officer or class of officers, and prescribes the way and manner of doing it, such direction cannot be disregarded. A due observance of it is essential, because the

constitution so provides, and its provisions are not in vain or of trifling moment. It is not of the nature of constitutions of government to provide non-essentials,-useless, unimportant details, such as may be disregarded and dispensed with. As we have said, they are organic, made upon solemn consideration by the sovereign authority, and contain general, essential provisions. Details are avoided in them, unless deemed inportant-essential. Non-essential details are left to the discretion of those who exercise and administer the powers of government. If this were not so, why prescribe the way and manner? Why not leave these things to convenience, and the authority charged with the exercise of the power? Why direct them? Why restrict them? And if such directions may be disregarded, ignored, suspended in some respects, then to what extent, and in what respects? If one co-ordinate branch of the government, or one class of officers, may do so, why may not another, and all, as to duties devolved upon them respectively, directly, by the constitution?

'The answer to these and like questions must be that requirements of the constitution shall prevail and be observed; and when it prescribes that a particular act or thing shall be done in a way and manner specified, such direction must be treated as a command, and an observance of it essential to the effectiveness of the act or thing to be done. *80 Such act cannot be complete, such thing is not effectual, until done in the way and manner so prescribed.'

It must be remembered that in this case the people themselves adopted the Seventh Amendment and thereby gave to the legislature the authority to facilitate its operation by legislation specially enacted. The legislature has done so in plain language. In my opinion, no court can, in effect, amend or nullify these statutory provisions solely because an unanticipated situation has arisen.

Finally, in the majority opinion it is stated, in effect, that, since the legislature failed to provide any guide as to the secretary's duties in a case where the petitions have been stolen, and since amendment 7 sets forth no procedure for ascertaining whether the required percentage of registered voters have signed the petition, the court should consider the provision in amendment 7, stating, 'This section is self-executing * * *.'

The majority then states:

'We have no doubt that the Secretary of State would consider it his duty to canvass the signatures in every case, even though no statute required it, but in this case he was called upon to make a decision without the benefit of the exact knowledge which a canvass would reveal. If the correctness of the decision which he made were in any doubt, or if there were a suggestion of fraud or mistake on the part of the proponents, we would hesitate to uphold that decision. But we think, in view of the fact that the evidence supporting the decision was undisputed and overwhelming, and there is no element of fraud or mistake involved, the intent and purpose of the framers of the constitution, in **573 reserving the power of referendum, can be given effect only if his decision is sustained.'

(How the evidence supporting the secretary's certificate can be described as undisputed and overwhelming when, as pointed out above, the mandatory provisions of the facilitating statutes were admittedly not complied with, I am unable to comprehend.)

The opinion of those judges who concur in the result of the majority expresses disagreement with the foregoing *81 quotation. Their concurrence in the result is based on the view that:

'The efficacy of amendment 7 does not depend upon its implementation by the legislature. As the trial court said: 'The statutes are effective only insofar as they facilitate the action of the self-execution constitutional provisions.'

'The factual pattern of the instant case is bizarre and fantastic. We are in the same position this court would have been in had the legislature refused to pass implementing legislation.'

This statement raises the important question of the proper interpretation of the self-executing clause in the constitution as applied to the facts of this case.

For purposes of discussion of the constitutional question thus raised, I will assume that there is no elgislation which is applicable to the problem before us.

I can find nothing in the words 'This section is self-executing' which justifies ignoring the remainder of the constitutional provisions whereby the people reserved to themselves the power of referendum.

Perhaps a review of the constitutional history on this subject may be helpful. From 1889, when the constitution was adopted, until 1912, the legislative authority of the state of Washington was vested exclusively in the legislature.

In 1912, amendment 7 was adopted. This amendment continued the legislative authority in the legislature, but added the provision:

'* * * but the people reserve to themselves the power to propose bills, * * * [this refers to the power of initiative with which we are not here concerned] and also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the legislature.'

The question then arises, how, in the absence of applicable legislation, do the people go about exercising this reserved power of referendum? The answer is provided in amendment 7, wherein it is said 'either by petition signed by the *82 required percentage of the legal voters' or by the legislature.

The question then is: What is the percentage of legal voters who must sign a petition before the people may exercise the reserved power of referendum with respect to any act of the legislature? In 1912, the answer was:

'Six per centum, but in no case more than thirty thousand, of the legal voters shall be required to sign and make a valid referendum petition.'

In 1956, the required number was changed as follows:

'Hereafter, the number of valid signatures of legal voters required upon a petition for an initiative measure shall be equal to eight percentum of the number of voters registered and voting for the office of governor at the last preceding regular gubernatorial election. Hereafter, the number of valid signatures of legal voters required upon a petition for a referendum of an act of the legislature or any part thereof, shall be equal to four percentum of the number of voters registered and voting for the office of governor at the last preceding regular gubernatorial election. These provisions supersede the requirements specified in section 1 of this article as **574 amended by the seventh amendment to the Constitution of this state.' (Amendment 30) (Italics mine.)

Thus the specific conditions required by the constitution which must be complied with before the people may exercise the reserved power of referendum may be summarized as follows:

A petition must be signed by *legal* voters equal in number to four per cent of the registered voters in the state who voted for the office of governor at the last preceding election. In the present case, the required number of legal voters is 48,630.

The problem then is: In the assumed absence of any legislation, how is this vital question determined? The self-executing provision in amendment 7 does not specify who shall determine this vital question of fact, but the permanent voters' registration act (RCW 29.07.130), enacted in 1933, provides a method of ascertaining whether the petition contains the requisite number of valid signatures of legal *83 voters. In the absence of a constitutional designation of a state officer to perform this vital duty, this vital factual issue could be determined by a court of competent jurisdiction. In any event, the underscored portion of amendment 30 (quoted above) cannot be completely ignored, as has been done in this case.

It seems clear to me that the words in the constitution stating that 'This section is self-executing' do not mean that the signatures on a referendum petition are self-canvassing. The opinions of the majority and of the judges concurring in the result do not take notice of the vital constitutional limitation which the people themselves placed in the Seventh Amendment as a condition precedent to the exercise of the reserved power of referendum, to wit, that the petition must contain 'the number of *valid* signatures of *legal* voters' (italics mine) equal to four per centum of the number of registered voters who voted for the office of governor at the last preceding election.

Without this vital fact being determined (i. e. whether the petition contains at least 48,630 valid signatures of legal voters), the whole proceeding is void. Since the people in their amendment to the constitution have said that the reserved power of referendum may be exercised *only* upon this express condition, and, since this condition has not been complied with in the present case, there can be no submission of Laws of 1963, chapter 37 (Referendum Measure No. 34) to a vote of the people.

It is stated that the will of the people should not be thwarted by the act of a felon, but I regard it a much more serious thing for a court to waive compliance with a mandatory constitutional

condition precedent to the exercise of the reserved power of referendum.

<u>FN3.</u> All provisions of our state constitution are mandatory unless by express words they are declared to be otherwise. Art 1, § 29.

If the procedure followed in this case is approved, it means that, hereafter, whenever petitions are lost, destroyed, or stolen under any circumstances, any proponent who has filed a referendum petition signed by the *requisite number* of persons (whether or not it contains the *valid* *84 signatures of the required number of *legal* voters) can cause the referendum measure involved to be submitted to the voters at the next election without a single signature thereon having been compared with those on the registration books. Speculation can be substituted for certainty, and the requirement for canvassing the signatures on the petition can be ignored entirely. As I see it, if these statutory and/or constitutional safeguards are to be ignored, there is as much danger that a petition having *less* than the requisite number of valid signatures of legal voters will in the future be submitted to the electorate as that valid petitions will fail to attain their objective.

The constitution means the same thing regardless of hardship, inconvenience, or even impossibility of compliance with it, **575 and no court can excuse noncompliance with its mandatory provisions.

In <u>State ex rel. Lemon v. Langlie, 45 Wash.2d 82, 273 P.2d 464 (1954)</u>, we quoted with approval the following statement from 11 Am.Jur. 651, Constitutional Law, § 44, regarding the function of a state constitution:

"A written Constitution is not only the direct and basic expression of the sovereign will, but is the absolute rule of action and decision for all departments and offices of government with respect to all matters covered by it and must control as it is written until it shall be changed by the authority that established it. No function of government can be discharged in disregard of, or in opposition to, the fundamental law. The estate Constitution is the mandate of a sovereign people to its servants and representatives. No one of them has a right to ignore or disregard its mandates; and the legislature, the executive officers, and the judiciary cannot lawfully act beyond the limitations of such Constitution." (p. 109)

With regard to the statement in the majority opinion that the court cannot assume that a theft of the petitions will ever occur again, I think that the court should not be led into upholding a violation of either the applicable statutory or the constitutional provisions on that assumption. In the Lemon case, supra, we quoted from *85State ex rel. Banker v. Clausen, 142 Wash. 450, 253 P. 805 (1927), in which we quoted the following statement from 6 R.C.L. 46:

"A cardinal rule in dealing with Constitutions is that they should receive a consistent and uniform interpretation, so that they shall not be taken to mean one thing at one time and another thing at another time, even though the circumstances may have so changed as to make a different rule seem desirable. In accordance with this principle, a court should not allow the facts of the particular case to influence its decision on a question of constitutional law, nor should a statute be construed as constitutional in some cases and unconstitutional in others involving like

circumstances and conditions. Furthermore, constitutions do not change with the varying tides of public opinion and desire. The will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and therefore the courts should never allow a change in public sentiment to influence them in giving a construction to a written Constitution not warranted by the intention of its founders." (Italics ours.)'

For the reasons stated, I would reverse the judgment of the trial court with directions to dismiss the summary judgment entered in favor of respondent and to grant petitioner's motion for summary judgment and accord him the relief prayed for in his complaint.

WASH. 1964 Rousso v. Meyers 64 Wash.2d 53, 390 P.2d 557

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Supreme Court of Washington, En Banc.

Theresa SCHREMPP and Mary Jarrard, Appellants,

v.

Ralph MUNRO, Secretary of State, and Lee Minto, Respondents. **No. 57907-5.**

May 16, 1991.

Plaintiffs brought suit challenging decision of Secretary of State to accept and file initiative. The Superior Court, Thurston County, Robert J. Doran, J., denied relief. The Supreme Court, Brachtenbach, J., held that: (1) statutes did not authorize opponents of initiative to challenge acceptance and filing of initiative; (2) allowing proponents of initiative to challenge refusal to file, while denying opponents right to challenge decision to accept and file initiative, did not violate equal protection; (3) there was no sustainable claim of arbitrary and capricious action or action contrary to law on part of Secretary in accepting and filing initiative; and (4) case was not mooted by certification of initiative to legislature.

Affirmed.

West Headnotes

[1] Statutes 361 \$\infty\$=302

361 Statutes

361IX Initiative

<u>361k302</u> k. Constitutional and Statutory Provisions. <u>Most Cited Cases</u>

Statutes 361 € 342

361 Statutes

361X Referendum

361k342 k. Constitutional and Statutory Provisions. Most Cited Cases

Legislation concerning initiative or referendum process may be enacted only to facilitate its operation. West's RCWA Const. Art. 2, § 1(d).

[2] Constitutional Law 92 \$\iinspec 2470

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)2 Encroachment on Legislature

92k2470 k. In General. Most Cited Cases

(Formerly 92k67)

Authority of judiciary over initiative or referendum process is limited to areas in which there is express statutory or constitutional law making question judicial. West's RCWA Const. Art. 2, § 1(a, d).

[3] Statutes 361 \$\iiii 315\$

361 Statutes

361IX Initiative

361k315 k. Determination of Sufficiency and Certification Thereof. Most Cited Cases Statute governing initiatives, rather than general election law, governed issue of standing to challenge decision of Secretary of State to accept and file initiative. West's RCWA 29.04.030, 29.04.030(4, 5), 29.79.010 et seq.

[4] Statutes 361 \$\infty\$=315

361 Statutes

361IX Initiative

<u>361k315</u> k. Determination of Sufficiency and Certification Thereof. <u>Most Cited Cases</u> There is no statutory authority authorizing opponents to an initiative to challenge decision of Secretary of State to accept and file initiative; judicial review is authorized only if Secretary refuses to file petition. <u>West's RCWA 29.79.010</u> et seq., <u>29.79.150</u>, <u>29.79.160</u>.

[5] Constitutional Law 92 \$\iiis 3635\$

92 Constitutional Law

92XXVI Equal Protection

92XXVI(E) Particular Issues and Applications

92XXVI(E)9 Elections, Voting, and Political Rights

92k3635 k. In General. Most Cited Cases

(Formerly 92k225.2(1))

Statutes 361 € 302

361 Statutes

361IX Initiative

<u>361k302</u> k. Constitutional and Statutory Provisions. <u>Most Cited Cases</u>

Statutes prohibiting opponents of initiative from judicially challenging decision of Secretary of State to accept and file initiative, while permitting proponents of initiative to challenge refusal to file, do not violate equal protection. West's RCWA 29.79.160; West's RCWA Const. Art. 1, § 12; Art. 2, § 1(a, d); U.S.C.A. Const. Amend. 14.

[6] Statutes 361 \$\iiii 315

361 Statutes

361IX Initiative

361k315 k. Determination of Sufficiency and Certification Thereof. Most Cited Cases Under court's limited judicial power to review discretionary decisions of Secretary of State in initiative and referendum process, there was no sustainable claim of arbitrary and capricious action or action contrary to law in Secretary of State's decision to accept and file initiative based on petitions that, except for one erroneous phrase, clearly indicated that they were intended to be initiative to legislature, as opposed to people, and omitted legislative title from text of measure on back of petitions. West's RCWA 29.79.090, 29.79.150; West's RCWA Const. Art. 2, § 1(a).

[7] Constitutional Law 92 \$\infty\$2623

92 Constitutional Law

92XX Separation of Powers

92XX(D) Executive Powers and Functions

92k2622 Encroachment on Judiciary

92k2623 k. In General. Most Cited Cases

(Formerly 92k79)

Secretary of State may not deprive Supreme Court of its statutory jurisdiction to review superior court's decision granting or refusing to grant writ of mandate or injunctive relief respecting Secretary of State's actions concerning initiative petition by electing to certify initiative to legislature during five-day statutory period for appellate review; overruling *Hanson v. Meyers*, 54 Wash.2d 724, 344 P.2d 513. West's RCWA 29.79.210.

**1382 *931 Janis P. Bianchi, Seattle, <u>Richard Hemstad</u>, Olympia, Sally A. Keller, Seattle, for respondent Minto.

BRACHTENBACH, Justice.

Appellants challenge the decision of the Secretary of State to accept and file Initiative 120, the merits of which are not at issue.

Appellants sued in superior court for injunctive and declaratory relief and a writ of mandamus. The trial court assumed, without deciding, that appellants were proper parties to challenge the acceptance and filing of the initiative. The trial court denied any relief. After oral argument this court issued an order affirming the trial court. We now state our reasons for affirming.

*932 The issues are:

- (1) Do appellants have statutory authority to challenge the decision of the Secretary of State?
- (2) If the statutes deny appellants standing, are the statutes unconstitutional?
- (3) Does this court have inherent authority to review the decision of the Secretary of State on the basis that the Secretary's action was arbitrary and capricious and contrary to law?
- (4) Is the matter moot because the Secretary of State certified the initiative to the Legislature

after the trial court denied relief and after this court denied an injunction to prohibit certification?

[1][2] Before discussing the issues, it is well to remember that, first, exercise of the initiative process is a constitutional right. "The first power reserved by the people is the initiative." Const. art. 2, § 1(a). Second, legislation concerning the initiative or referendum process may be enacted only to facilitate its operation. Const. art. 2, § 1(d). Third, the authority of the judiciary over the process is limited. "[W]e are dealing with a political and not a judicial question, except only in so far as there may be express statutory or written constitutional law making the question judicial." State ex rel. Donohue v. Coe, 49 Wash.2d 410, 417, 302 P.2d 202 (1956) (quoting State ex rel. Case v. Superior Court, 81 Wash. 623, 633, 143 P. 461 (1914)).

Respondent Minto filed a proposed initiative, now known as Initiative 120; it included a legislative title. The code reviser issued a certificate of review. <u>RCW 29.79.015</u>. The Attorney General prepared a summary and ballot title. <u>RCW 29.79.040</u>.

The petition forms circulated to obtain voter signatures contain on the back the **1383 text of the measure, but do not contain a legislative title. On the front of the petitions there appear the ballot title and summary prepared by the Attorney General.

*933 Also on the front of the petitions there appear the operative words of the petition, *i.e.*, that it is addressed to the Secretary of State and that the undersigned citizens and legal voters direct that the proposed measure "be transmitted *to the legislature*" and that the signers "petition the *legislature* to enact said proposed measure into law." (Emphasis ours.) In a box headed "NOTE" it states that "200,000 signatures are needed to place Initiative 120 *before the Legislature*." (Emphasis ours.) Above the lines on which voters sign, there appears in capital letters: "WASHINGTON STATE VOTERS SIGN BELOW TO SUBMIT INITIATIVE 120 TO THE LEGISLATURE IN 1991."

The challenge to the contents of the petitions arises from an erroneous statement which appears below the warning about improper signatures and above the words noted above addressed to the Secretary of State. The following words constitute the erroneous statement: "INITIATIVE PETITION FOR SUBMISSION TO THE PEOPLE."

Appellants contend that the initiative is fatally flawed (1) because of the statement that it is a petition for an initiative to the people, when in fact it is addressed to the Legislature (as stated in four places on the face of the petition), and (2) because there is not a legislative title in the text of the proposed measure.

Ι

THE STATUTES DO NOT AUTHORIZE THE OPPONENTS OF AN INITIATIVE TO CHALLENGE THE ACCEPTANCE AND FILING OF AN INITIATIVE.

We turn to the statutes to determine whether they authorize appellants' challenge.

The superior court, to facilitate a decision, assumed without deciding that appellants were proper parties to bring this challenge. By so doing, that court did not decide the appellants' equal protection challenge to the statute.

[3] RCW 29.79 provides the mechanism for implementing the constitutional rights of initiative and referendum. Appellants first argue that they have a right of challenge under RCW 29.04, the general elections law, regardless of *934 the specific initiative procedures of RCW 29.79. Specifically they argue that standing and jurisdiction are conferred by RCW 29.04.030(4) and (5), entitled "Prevention and correction of election frauds and errors." Appellants' contention is without merit. RCW 29.79 is the specific statute governing initiatives and referendums. It is complete in itself and tailored solely to initiatives and referendums. Thus, RCW 29.79 is the applicable statute to the exclusion of the general elections law, RCW 29.04. See <u>In re Estate of Little</u>, 106 Wash.2d 269, 284, 721 P.2d 950 (1986).

Quite apart from the specific statute governing over the general statute, RCW 29.79 is controlling because application of RCW 29.04.030 would render meaningless the specific provisions of RCW 29.79. All actions of the Secretary of State concerning initiatives would be subject to challenge by any voter under RCW 29.04.030. Such a result would negate the necessity of and the procedures provided by RCW 29.79.060, .150, and .210. Statutes should be interpreted so as to not leave one statute mere surplusage. Sim v. State Parks & Recreation Comm'n, 90 Wash.2d 378, 382-83, 583 P.2d 1193 (1978); Avlonitis v. Seattle Dist. Court, 97 Wash.2d 131, 641 P.2d 169, 646 P.2d 128 (1982).

[4] We next examine the applicable statute in RCW 29.79 to ascertain whether opponents to an initiative are authorized to challenge the decision of the Secretary of State to *accept and file* an initiative. The law is explicit. RCW 29.79.150 grants discretionary authority to the Secretary of State who *may refuse* to file an initiative **1384 or referendum upon any of three specified grounds, *i.e.*, its form, insufficiency of number of signatures, or timeliness. "If none of the grounds for refusal exists, the secretary of state *must* accept and file the petition." (Emphasis ours.) RCW 29.79.150.

Judicial review of the administrative decision of the Secretary of State is authorized only if the Secretary *refuses* to file the petition. <u>RCW 29.79.160</u>. The right to challenge is limited to the persons submitting it for filing. The time for and place of challenge is limited. If the superior court *935 mandates filing of the petition, that decision is final. In other words, there is no statutory authority for appellate review. <u>RCW 29.79.160</u>.

II

[5] THERE IS A REASONABLE BASIS TO DISTINGUISH BETWEEN THE RIGHT OF PROPONENTS OF AN INITIATIVE TO CHALLENGE A REFUSAL TO FILE, AND THE DENIAL OF SUCH RIGHT TO THE OPPONENTS TO CHALLENGE A DECISION TO ACCEPT AND FILE AN INITIATIVE. THE STATUTES ARE CONSTITUTIONAL.

Appellants contend that the limitation in RCW 29.79.160 is a violation of their constitutional

right to equal protection under <u>Const. art. 1, § 12</u>. Appellants make no claim that the scope of the state constitution differs from federal equal protection. *See <u>State v. Gunwall</u>*, 106 Wash.2d 54, 61-62, 720 P.2d 808 (1986).

The classifications are (1) the proponents of an initiative measure who are authorized to challenge a refusal to file the petition, and (2) the opponents who are denied the right to challenge a decision to accept a petition. The appropriate standard of judicial review is the rational basis test. *Forbes v. Seattle*, 113 Wash.2d 929, 940, 785 P.2d 431 (1990). Appellants argue that there is no reasonable basis to distinguish between the rights of the proponents and the opponents.

A reasonable basis is plainly evident to permit a challenge by the proponents of an initiative to the refusal to file a petition and to deny a challenge by the opponents to the decision to accept and file a petition. The proponents are exercising a constitutional right to petition. Const. art. 2, § 1(a). Legislation impacting that constitutional right can only be enacted "especially to facilitate its operation." Const. art. 2, § 1(d). By contrast, the opponents can claim no constitutional right to impede the exercise of the proponents' constitutional rights. The opponents do have constitutional rights which they can express to the Legislature in its consideration of the initiative, and, if it goes to a vote of the people, they can express *936 their opposition and vote thereon. Const. art. 1, § 5; Const. art. 6. In short, there is a reasonable basis for the Legislature to facilitate the initiative process by allowing a challenge to the refusal to accept and file an initiative, and not to impede the process by permitting a challenge by an opponent who would like to prevent an initiative from consideration by the Legislature and the voters.

Appellants rely upon *In re Ballot Title for Initiative 333*, 88 Wash.2d 192, 558 P.2d 248, 559 P.2d 562 (1977), to support their equal protection claim. That case is readily distinguishable. The statute there considered was former RCW 29.79.060 which permitted a judicial challenge to the ballot title only by the proposers of an initiative. We held that such limitation was a denial of equal protection. We logically perceived that the opponents of an initiative had an equal interest in an impartial ballot title. The heart of the court's rationale was this:

If impartiality is required, it is unreasonable to deny review to opponents. Denying review to opponents has the effect of allowing a ballot title which is favorable to the proposers' purpose to remain the permanent ballot title while allowing proposers to challenge a ballot title which is unfavorable to their purpose.

**1385 <u>Initiative 333</u>, at 196, 558 P.2d 248. The amended statute now permits challenge by any person dissatisfied with the ballot title or summary. <u>RCW 29.79.060</u>. The interests of the opponents which were recognized in *Initiative 333* advanced the exercise of the initiative process; the efforts of the appellants here are to stop the initiative process by preventing the petition from reaching the Legislature or the people.

Ш

[6] THERE IS LIMITED JUDICIAL POWER TO REVIEW DISCRETIONARY DECISIONS

IN THE INITIATIVE AND REFERENDUM PROCESS. HERE THERE IS NO SUSTAINABLE CLAIM OF ARBITRARY AND CAPRICIOUS ACTION OR ACTION CONTRARY TO LAW.

Appellants next argue that apart from statutory authority, this court has "inherent equity power to intervene in cases of election fraud or wrongdoing. *937 Foulkes v. Hays, 85 Wash.2d 629, 537 P.2d 777 (1975); State ex rel. Berry v. Superior Court, 92 Wash. 16, 24, 159 P. 92 (1916)." Brief of Appellants, at 13. The appellants' broad statement of principle excludes their own claims. This is not a case of election fraud or wrongdoing. A more thorough explanation of our power of review is contained in Kreidler v. Eikenberry, 111 Wash.2d 828, 835, 766 P.2d 438 (1989).

Despite the unavailability of either direct or discretionary review, we may, in unusual circumstances, exercise our inherent power of review to determine if the trial court's decision is arbitrary, capricious, or contrary to law. <u>Marino Property Co. v. Port Comm'rs of Port of Seattle</u>, 97 Wash.2d 307, 644 P.2d 1181 (1982).

Kreidler, at 837, 766 P.2d 438.

Appellants do not discuss the standards contained in *Kreidler*. In a leap of illogic they argue that this case does not involve any question involving the arbitrary and capricious standard, but merely a question of statutory interpretation. Appellants have confused a constitutional issue of the power and extent of judicial review with a simple standard of review of a question of law in a case properly on appeal and within the constitutional boundaries of judicial power.

Even if appellants' arguments raised the question of inherent power to review arbitrary and capricious or contrary to law action, their contentions fail.

The statute provides that the Secretary of State *may* refuse to file a petition if it is not in the form required by the statute. RCW 29.79.150. The statute sets out a form of petition and requires that the petition be *substantially* in that form. RCW 29.79.090. Inherent in the decision of the Secretary of State to accept and file this petition was his determination that the petition was substantially in the form required. The Secretary's right to refuse is conditioned by the discretionary word "may." Clearly his decision is a discretionary administrative act. We have so held for more than six decades. *State ex rel. Harris v. Hinkle*, 130 Wash. 419, 429, 227 P. 861 (1924).

*938 Equally clear is the conclusion that the Secretary of State was not acting contrary to law. Indeed, his decision was pursuant to a grant of discretionary authority. The petitions contained one erroneous phrase, "to the people," but the operative paragraph twice declared that it was an initiative to the Legislature, and the large print immediately above the signature lines stated: "WASHINGTON STATE VOTERS SIGN BELOW TO SUBMIT INITIATIVE 120 TO THE LEGISLATURE IN 1991." Our analysis is not intended to be a judgmental substitution for the Secretary of State's decision, but rather to show that his action was not a " "willful and unreasoning action, without consideration and in disregard of facts or circumstances" "." Kreidler v. Eikenberry, supra at 837, 766 P.2d 438 (quoting Equitable Shipyards, Inc. v. State,

93 Wash.2d 465, 474, 611 P.2d 396 (1980), quoting *DuPont-Fort Lewis Sch. Dist. 7 v. Bruno*, 79 Wash.2d 736, 739, 489 P.2d 171 (1971)).

**1386 Appellants also contend that the lack of a legislative title in the text of the measure on the back of the petitions renders it void and presumably contrary to law. Const. art. 2, § 1(a) provides the petition forms "shall include the full text of the measure so proposed." Appellants cite no authority that a legislative title is part of the required text. We agree with the analysis of State ex rel. Jones v. Charboneau's, 27 Wash.App. 5, 9, 615 P.2d 1321 (1980), that the legislative title need not appear in the text on the petition.

IV

[7] THIS CASE IS NOT MOOTED BY THE CERTIFICATION OF THE INITIATIVE TO THE LEGISLATURE.

Finally, respondents move to dismiss, contending the case is moot under <u>Hanson v. Meyers</u>, 54 <u>Wash.2d 724</u>, 344 P.2d 513 (1959). That case involved a challenge pursuant to <u>RCW 29.79.210</u> to the number of signatures. The superior court denied a request for a restraining order. Before this court issued a writ of certiorari, the Secretary of State certified the initiative to the Legislature. The court held the *939 matter was moot because the certification made it useless to inquire into the decision of the superior court denying an injunction.

We believe that decision is wrong; it is contrary to the applicable statute and is overruled. The statute, RCW 29.79.210, provides in part:

The decision of the superior court granting or refusing to grant the writ of mandate or injunction may be reviewed by the supreme court within five days after the decision of the superior court, and if the supreme court decides that a writ of mandate or injunction, as the case may be, should issue, it shall issue the writ directed to the secretary of state; otherwise, it shall dismiss the proceedings.

The error in the reasoning of *Hanson* is that it nullifies the limited time for appellate jurisdiction. The statute grants this court a right of appellate review of a superior court's decision within 5 days after that decision. The Secretary of State cannot deprive a litigant of the right to review by certification during the 5-day period. We recognize that appellants, under our holding, do not have a similar statutory right of review, but the initiative/referendum process requires as much procedural certainty as possible. Hence, we deny the motion to dismiss as moot.

We affirm the judgment of the trial court.

DORE, C.J., and UTTER, <u>DOLLIVER</u>, ANDERSEN, <u>DURHAM</u>, <u>SMITH</u>, <u>GUY</u> and JOHNSON, JJ., concur. Wash.,1991. Schrempp v. Munro 116 Wash.2d 929, 809 P.2d 1381

Supreme Court of Washington, En Banc. Caroline A. SUDDUTH, Appellant,

v.

Bruce K. CHAPMAN, Secretary of State, State of Washington, Respondent. **No. 44460.**

Jan. 7, 1977. For Dissenting Opinion, see <u>559 P.2d 1351</u>.

Proponent of initiative measure brought action seeking writ of mandate to compel the Secretary of State to certify the measure. The Superior Court, Thurston County, Frank E. Baker, J., denied relief, and proponent appealed. The Supreme Court, Rosellini, J., held that statute providing that if the Secretary finds the same name signed on more than one petition, he shall reject the name as often as it appears is in excess of the legislative authority granted by the Constitution, and the names of such duplicate signers should be counted once; that the Secretary has duty to see that his registration records are kept current, at least to the extent of making reasonable effort to convince delinquent registration officers that they should comply with requirements of statute requiring weekly registration reports, and of maintaining the records in his own office so that signatures can be effectively and accurately checked; and that in light of evidence that there were a substantial number of errors, that the Secretary had not taken any steps to see that the situation with respect to his records was corrected, and that only 264 signatures out of 13,043 rejected signatures were needed to qualify the measure, presumption of validity attaching to a signature on a petition weighed sufficiently in proponent's favor to entitle her to have the measure placed on the ballot.

Ordered accordingly.

West Headnotes

[1] Statutes 361 € 302

361 Statutes

361IX Initiative

<u>361k302</u> k. Constitutional and Statutory Provisions. <u>Most Cited Cases</u>

Statutes 361 €= 342

361 Statutes

361X Referendum

361k342 k. Constitutional and Statutory Provisions. Most Cited Cases

Provisions of the Constitution which reserve the right of initiative and referendum are to be liberally construed to the end that such right may be facilitated, and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right. RCWA

Const. art. 2, § 1a as amended by Amend. 30.

[2] Statutes 361 \$\infty\$=302

361 Statutes

361IX Initiative

361k302 k. Constitutional and Statutory Provisions. Most Cited Cases

Statutes 361 € 309

361 Statutes

361IX Initiative

361k309 k. Signers. Most Cited Cases

Statutes 361 € 342

361 Statutes

361X Referendum

361k342 k. Constitutional and Statutory Provisions. Most Cited Cases

Statutes 361 € 349

361 Statutes

361X Referendum

361k349 k. Signers. Most Cited Cases

Statute providing that, if the Secretary of State finds the same name signed to more than one petition, he shall reject the name as often as it appears exceeds the authority conferred on the legislature under the Constitution to enact legislation "especially to facilitate" the operation of initiative and referendum, in absence of showing of facts on which it could reasonably have been found that such statute was necessary to facilitate the initiative process and guard its integrity, and thus persons who signed petitions more than once would be counted once for purposes of determining whether sufficient number of registered voters had signed petitions. RCWA 29.79.200; RCWA Const. art. 2, § 1a as amended by Amend. 30.

[3] Statutes 361 \$\iii 302\$

361 Statutes

361IX Initiative

361k302 k. Constitutional and Statutory Provisions. Most Cited Cases

Where constitutional provision with respect to initiative and referendum was amended in 1956 to change the percentage of voters required to propose a measure, in the absence of language in the amendatory enactment indicating that enactor's attention was directed to the subject of counting duplicate signatures on petitions, it would not be presumed that the amendment was intended to affect that subject, despite contention that the people, in adopting the amendment, intended to incorporate statute relating to that subject which had first been enacted in 1913 and had never been challenged. RCWA 29.79.200; RCWA Const. art. 2, § 1a as amended by Amend. 30.

[4] Statutes 361 \$\iii 311\$

361 Statutes
361IX Initiative
361k311 k. Signatures. Most Cited Cases

Statutes 361 € 351

361 Statutes

361X Referendum

361k351 k. Signatures. Most Cited Cases

Statute placing on Secretary of State duty of canvassing names on initiative or referendum petitions also imposes some duty on him to see that his records of registered voters are reasonably current; if he is not receiving the weekly registration reports required by statute, he can make a reasonable effort to convince delinquent registration officers that they should comply with the statutory requirement, and he must be diligent in maintaining records in his own office so that signatures can be effectively and accurately checked. RCWA 29.07.120, 29.07.130, 29.79.090, 29.79.220.

[5] Elections 144 \$\infty\$ 227(1)

144 Elections

144VIII Conduct of Election

144k227 Effect of Irregularities or Defects

144k227(1) k. In General. Most Cited Cases

Irregularities under the laws governing elections will not be overlooked where they result in denial of the franchise or the right of petition.

[6] Statutes 361 € 311

361 Statutes

361IX Initiative

361k311 k. Signatures. Most Cited Cases

Where proponent of initiative measure was able to show in short time available that 16 of 21 rejected signatures on petitions were those of registered voters and evidence showed that the Secretary of State was aware of the deficient state of his records and did not claim to have taken any steps to see that the situation was corrected, and where out of 13,043 rejected signatures only 264 were needed to qualify the measure, presumption of validity which attaches to a signature on a petition weighed sufficiently in proponent's favor to entitle her to have the measure placed on the ballot. RCWA 29,79,200.

*248 **807 Hamley & Hamley, G. Cliff Armstrong, Jr., Bellevue, for petitioner.

Slade Gorton, Atty. Gen., Wayne L. Williams, Asst. Atty. Gen., Olympia, for respondent.

ROSELLINI, Associate Justice.

The appellant brought an action in the Superior Court for Thurston County, pursuant to RCW *249 29.79.210, seeking a writ of mandate to compel the respondent Secretary of State to certify to the ballot Initiative No. 322, popularly known as the 'antifluoridation' measure. The respondent had, after canvassing the petitions, determined that they lacked sufficient signatures**808 to qualify under Const. art. 2, s 1a (amendment 30). [FN1]

<u>FN1.</u> Const. art. 2, s 1a (amendment 30), provides, in part: 'Hereafter, the number of valid signatures of legal voters required upon a petition for an initiative measure shall be equal to eight percentum of the number of voters registered and voting for the office of governor at the last preceding regular gubernatorial election.'

Evidence introduced by the appellant at the Superior Court hearing showed that the respondent had rejected the signatures of 4,656 registered voters because they had signed petitions more than once. The rejection was based upon RCW 29.79.200 which provides, inter alia: 'If the secretary of state finds the same name signed to more than one petition he shall reject the name as often as it appears.'

The appellant also showed that, in the brief period of time during which she had access to the petitions before the court hearing, it was discovered that a number of rejected signatures were in fact signatures of registered voters. Testimony of her expert tended to show that a projection of the ratio of valid signatures to the total number investigated would lead to a conclusion that more than a sufficient number of registered voters had signed the petitions. While the objectivity of the sample used and the qualifications of the witness were questioned by the respondent, he offered no expert testimony contradicting the projections.

The reason that some registered voters were rejected, it appears, was that the respondent did not have in his office any record, or in some cases the current record, of their registration, and did not look beyond the cards on file in his office to determine whether persons signing the petitions were registered voters. The appellant had discovered the canvassing errors by checking 21 rejected signatures against *250 King County voter registration records. She found that 16 of these were registered voters.

The appellant challenged the constitutionality of the provision of RCW 29.79.200 quoted above, contending that all registered voters who signed the petitions were entitled to have their signatures counted once. She further contended that the Secretary of State had the duty to check the rejected signatures against local records, or accord them a presumption of validity, where such rejections were based upon the fact that the names did not appear on records in the respondent's office. The Superior Court rejected both of these contentions, holding RCW 29.79.200 constitutional and concluding that, under applicable statutes, in performing his function of canvassing initiative petitions, the Secretary of State is not obliged to look beyond the registration cards on file in his office, or to take any action to assure that his records are current.

When the appeal to this court was argued, we determined that the Superior Court should be reversed. Because the fruits of the appeal would be lost if you order had to await the preparation

of an opinion, there remaining barely sufficient time before election day to comply with the procedures provided in the election law for placing the issue on the ballot, we issued the writ and noted that an opinion would follow. While the initiative subsequently failed at the polls, that fact does not relieve the court of the obligation to explain its order (Const. art. 4, s 2), and this opinion may be regarded as relating back to the date of the writ.

We consider first the constitutionality of <u>RCW 29.79.200</u>, insofar as it provides that, if the Secretary of State finds the same name signed to more than one petition, he shall reject the name as often as it appears. It is contended that this provision exceeds the authority conferred upon the legislature under Const. art. 2, s 1a, to enact legislation 'especially to facilitate' the operation of the section providing for the initiative and referendum. This authorization directly follows and modifies the declaration that the section is self-executing.

*251 [1] Those provisions of the constitution which reserve the right of initiative and **809 referendum are to be liberally construed to the end that this right may be facilitated, and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right. Rousso v. Meyers, 64 Wash.2d 53, 390 P.2d 557 (1964); State ex rel. Howell v. Superior Court, 97 Wash. 569, 166 P. 1126 (1917); State ex rel. Case v. Superior Court, 81 Wash. 623, 143 P. 461 (1914).

[2] Was the legislature justified in denying to registered voters who signed petitions more than once, the right to have one of these signatures counted? Does the measure facilitiate the initiative process? The respondent makes no showing that it does. The intent of amendment 30, as we read it, was to require that an initiative measure be placed upon the ballot if the requisite number of registered voters sign it. Refusing to count a duplicate signer as one petitioner frustrates, rather than furthers this purpose.

This court impliedly recognized this principle in Edwards v. Hutchinson, 178 Wash. 580, 35 P.2d 90 (1934), where it said that when a legal voter has signed a referendum petition, his signature must be counted, even though the person soliciting his signature has violated the law.

Is the measure nevertheless necessary to 'fairly guard against fraud and mistake?' (Rousso v. Meyers, supra; State ex rel. Howell v. Superior Court, supra.) The respondent does not argue that it is. While there are 20 states having constitutions which provide for the initiative and referendum (See 21 Book of the States 1976-1977, Table 7 at 218 (1976), he does not suggest that any of them has found it necessary to enact a provision such as that found in RCW 29.79.200, in order to protect the integrity of the initiative process. Our own research has failed to disclose a comparable provision. There appears to be a dearth of cases upon the point, but the Arizona Supreme Court has held without hesitation that where a signature *252 appears more than once on a petition, it should be counted once. Whitman v. Moore, 59 Ariz. 211, 125 P.2d 445 (1942) (overruled with respect to another point only in Renck v. Superior Court, 66 Ariz. 320, 187 P.2d 656 (1947).) There the court said, at page 228, 125 P.2d at page 454:

In view of the multiplicity of petitions which are circulated before each election, it is not surprising that some honest citizens may become so confused by the number of petitions

presented to them that they may inadvertently sign two or more for the same measure. This, of course, is carelessness on their part, but if they are legally entitled to sign, we think one signature should be allowed and the others stricken.

There is nothing to indicate that the purpose of this provision was to discourage duplication of signatures. It is significant that <u>RCW 29.79.090</u>, which directs that signers be warned of criminal sanctions, does not require that they be warned that duplicate signatures will not be counted.

Were there some showing of facts upon which the legislature could reasonably have found that this provision was necessary to facilitate the initiative process and guard its integrity, we would, of course, be obliged to defer to the legislative judgment; but since no state of facts which would justify it has been proposed, in order to protect the right of the people which was reserved by them in their constitution, we must hold this portion of RCW 29.79.200 to be in excess of the legislative authority granted.

[3] The respondent's theory is that the people, in adopting amendment 30 in 1956, intended to incorporate the provision of RCW 29.79.200 relating to the counting of duplicate signatures, which had first been enacted in 1913, and has never been challenged. This intent can be found, he says, in the fact that the amendment requires a specified number of 'valid signatures of legal voters,' whereas article 2, section 1a, did not speak in terms of signatures but rather provided that initiative measures **810 should be proposed by a certain percentage of 'legal voters.' Obviously, this change in language was one of form rather than substance. There was *253 implicit in article 2, section 1a, a requirement that the signatures be valid, that is, genuine.

A reading of the amendment will disclose that its purpose was to change the percentage of voters required to propose a measure. It did not purport to deal with the criteria or methods of determining who is a 'registered voter' or what is a 'valid signature.' In the absence of language in an amendatory enactment indicating that the enactor's attention was directed to a given subject, it will not be presumed that the amendment was intended to affect that subject. See <u>State v. Sam</u>, 85 Wash.2d 713, 538 P.2d 1209 (1975).

If the names of the signers whose signatures appeared more than once upon the petitions are added to the total certified by the respondent, the petitions are still short of the required number by 264. The appellant's evidence tended to show that, because the records in the office of the respondent were not kept current, a large number of registered voters were erroneously rejected-and most probably a sufficient number to validate the petition. However, it was the opinion of the Superior Court that the Secretary of State has no statutory obligation to take affirmative steps to see that these records are current. We find the statutes open to a different interpretation.

[4] RCW 29.79.220 places upon the Secretary of State the duty of canvassing the names on a petition within a specified time. It does not provide a method of determining whether the signatures are those of registered voters. RCW 29.07.090 provides that, at the time of registering any voter, each registration officer shall require him to sign his name upon a card and give his address and precinct. Those cards are to be sent to the Secretary of State's office weekly. RCW 29.07.120.

RCW 29.07.130 provides:

The cards required by <u>RCW 29.07.090</u> shall be kept on file in the office of the secretary of state in such manner as will be most convenient for, and for the sole purpose of, checking initiative and referendum petitions and *254 mailing pamphlets required for constitutional amendments and by the initiative and referendum procedure. They shall not be open to public inspection or be used for any other purpose.

It was evidently the opinion of the trial court and is argued here that the Secretary of State under these statutes is obliged to rely upon the diligence of the local registration officers in forwarding registration cards to his office, and is neither authorized nor required to take any action to see that his records are current. We cannot agree with this narrow reading of the statute which places upon him the duty of canvassing the initiative and referendum petitions. RCW 29.07.130 provides that the registration cards shall be used for the sole purpose provided therein. It does not mean that the Secretary of State has no duty to see that his records are kept current. Statutes regulating the elective process should be liberally construed in the voter's favor. Knowles v. Holly, 82 Wash.2d 694, 513 P.2d 18 (1973); State ex rel. Orr v. Fawcett, 17 Wash. 188, 49 P. 346 (1897).

It must be remembered that the legislature, in placing this responsibility upon the Secretary of State, gave him the primary duty of carrying out the constitutional mandate with respect to the people's right to exercise the legislative power. We cannot conceive that that duty requires no affirmative effort on his part to see that his records are reasonably current, so that persons entitled under the constitution to join in such petitions may have their names counted.

There may be and undoubtedly are limits to the methods which the Secretary of State can employ in making sure that his records are in good order. We do not suggest that, under ordinary circumstances, he is required to examine local registration records. But if he is not receiving the weekly reports required under RCW 29.07.120, he can make a reasonable effort to **811 convince the delinquent registration officers that they should comply with the requirements of the statute. Also, he must be diligent in maintaining the records in his office so that signatures can be effectively and *255 accurately checked. While the Secretary of State necessarily has discretion in selecting the methods of keeping his records current and orderly, some action must be taken when the records are known to be incomplete.[FN2]

<u>FN2.</u> In fairness to the respondent, it should be noted that his interpretation of his duties does not differ materially from that of his predecessors.

[5] The respondent states that this court has, for over 80 years, held that where there has been substantial compliance with the requirements of the laws governing elections, the actions will be upheld, citing Seymour v. Tacoma, 6 Wash. 427, 33 P. 1059 (1893); Loop v. McCracken, 151 Wash. 19, 274 P. 793 (1929); and Vickers v. Schultz, 195 Wash. 651, 81 P.2d 808 (1938). All of these cases have held that technicalities will be overlooked in order to give effect to the will of the people expressed in an election. They do not support the proposition that irregularities will be overlooked where they result in the denial of the franchise or the right of petition.

[6] It must be remembered that the constitutional provision is self-executing. In a case such as this, where the proponent of a measure was able to discover a substantial number of errors due to inadequacy of records within a very short period of time, and where the evidence shows that the Secretary of State was aware of the state of his records and does not claim to have taken any steps to see that the situation was corrected, and where out of 13,043 rejected signatures only 264 are needed to qualify the measure, we think that the presumption of validity which attaches to a signature upon a petition [FN3] must weigh sufficiently in the proponent's favor to entitle her to have the measure placed upon the ballot.

<u>FN3.</u> There is a presumption that petitions that have been circulated, signed, and filed are valid, and the burden of proof to show their invalidity rests upon those protesting against them. <u>Whitman v. Moore, 59 Ariz. 211, 125 P.2d 445 (1942)</u>; <u>State ex rel. Hill v. Olcott, 67 Or. 214, 135 P. 902 (1913)</u>; <u>42 Am.Jur.2d Initiative and Referendum s 54 (1969)</u>.

*256 It has previously been so ordered.

HUNTER, WRIGHT, BRACHTENBACH and DOLLIVER, JJ., concur. WASH 1977. Sudduth v. Chapman 88 Wash.2d 247, 558 P.2d 806

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*256 HOROWITZ, Associate Justice (dissenting).

The Secretary of State refused to certify Initiative Measure No. 322 for the ballot, because the initiative lacked sufficient signatures (117.804) to comply with Amendment 30 to the State Constitution as implemented by RCW 29.79 as amended, particularly RCW 29.79.200; and RCW 29.07.090 and RCW 29.07.130.

The trial court after taking evidence, upholding the action of the Secretary of State entered findings, conclusions and judgment. Petitioner appealed the trial court's judgment to this court and this court by a vote of 5 to 4 reversed.

The majority opinion relies on three grounds for reversal, (1) <u>RCW 29.79.200</u>, **1352 which provides that multiple signatures by one person on initiative and referendum petitions are not to be counted, is void, (2) <u>RCW 29.07.130</u> and <u>RCW 29.07.090</u> do not confine the Secretary of State of checking the validity of signatures on petitions to signatures on voter registration cards in his office, and (3) if grounds one and two are valid, there is sufficient evidence to prove Initiative Measure No. 322 contains the remaining ballot signatures needed to qualify the initiative for the ballot.

If any of the three arguments is not accepted, then there are insufficient signatures on the initiative for the ballot and the trial court's judgment must be affirmed.

It is our duty to give full effect to the will of the people as set forth in Amendments 7 and 30 to

the State Constitution. The people have imposed and also authorized the legislature to impose certain safeguards to protect the *257 integrity and the workability of the operation of the initiative and referendum. We give effect to the will of the people both when we uphold the validity of the canvassing process upon a proper showing and when we uphold the action of the Secretary of State in refusing to certify an initiative for the ballot when the law and facts require such an action. We now consider the three arguments on which the majority relies to reverse the trial court's judgment.

MULTIPLE SIGNATURES-RCW 29.79.200

There was still a shortgage in the required number of signatures for Initiative Measure No. 322 even if multiple signatures by each person signing more than once on the initiative petitions are counted as one signature.

The Seventh Amendment to the State Constitution was approved November 1912. Article 2, section 1(d) of the amendment made express provision for implementing legislation as follows:

All such petitions shall be filed with the secretary of state, who shall be guided by the general laws in submitting the same to the people until additional legislation shall especially provide therefor. This section is self-executing, but legislation may be enacted especially to facilitate its operation.

The legislature in 1913 then enacted implementing legislation. Laws of 1913, ch. 138, p. 418. The legislation included provisions prohibiting and discouraging multiple signatures on initiative and referendum petitions presumably to 'facilitate' the operation of the initiative referendum process. Laws of 1913, ch. 138, s 15, p. 426; s 16, p. 427; and s 31, p. 435. Section 15 reads in part:

If he (Secretary of State) find the same name signed to more than one petition he shall reject both names from the count.

This language was retained when the statute was amended by Laws of 1933, ch. 144, s 1, p. 490. The substance of the language was again retained in Laws of 1965, ch. 9, s 29.79.200, p. 901 and Laws of 1969, 1st Ex.Sess. ch. *258 107, s 1, p. 815. The 1969 act contains the language now in RCW 29.79.200:

If the secretary of state finds the same name signed to more than one petition he shall reject the name as often as it appears.

The foregoing language has not been changed.

The legality of the 1913 provision dealing with multiple signatures has been assumed as a proper exercise of legislative power delegated to the legislature by the Seventh Amendment. This court so assumed in <u>State ex rel. Case v. Superior Court, 81 Wash. 623, 143 P. 461 (1914)</u>. In describing the secretaries of state's duty and power to reject signatures for fraud under the 1913 statute as it then read, the court pointed out the only power the Secretary of State had was to

refuse to count multiple signatures as provided by the 1913 statute. Had the court believed the Secretary of State had no such power, this reason would not have been available. Until the filing of the majority opinion in the instant case, successive secretaries of state, in obedience to the **1353 mandate of the 1913 act first reaffirmed by the 1933 amendment, have refused to count multiple signatures at all.

The majority argues, the multiple signature statute is void because it does not 'facilitate' the operation of the initiative process as required by Const. art. 2, s 1(a) (amendment 7), Supra. I do not agree.

When the legislature granted authority in amendment 7 to enact legislation to facilitate the operation of the initiative and referendum process, it necessarily vested in the legislature a discretion in its choice of means so to do. This is made clear by the rationale used in <u>State ex rel. Kiehl v. Howell, 77 Wash. 651, 138 P. 286 (1914)</u>; <u>State ex rel. Chamberlain v. Howell, 80 Wash. 692, 142 P. 1 (1914)</u>; and <u>State v. Conifer Enterprises, Inc., 82 Wash.2d 94, 508 P.2d 149 (1973)</u>. In Kiehl a statute required initiative petitions to be filed not less than 10 months before the election on the initiative. The statute was held valid notwithstanding the Seventh Amendment provided the initiative would be on *259 the ballot 'if filed at least four months before the election'. The court said:

The legislature is expressly authorized to enact laws to facilitate the initiative and referendum. It seems clear to us that a limitation upon the time within which, prior to the election, a proposed measure may be filed and the procuring of signatures of voters to the petitions commenced is a proper subject of legislation, looking to orderly procedure and fairness to the electors. While the constitutional amendment is declared to be self-executing, it is apparent that its execution would be almost, if not wholly, impracticable without legislation of some such nature as this. It, of course, is necessary that some practical test be provided for determining whether the signers of the petitions are legal voters. It is, of course, but fair that the petitions should, so far as practical, be signed only by those who would be voters at the election. This can be secured with greater certainty by having the petitions signed as near the time of the election as practical. . . . We are of the opinion that it is within the power of the Legislature to fix a reasonable limit of time preceding the election within which an initiative measure may be filed with the Secretary of State.

State ex rel. Kiehl v. Howell, supra, 77 Wash. at 654, 138 P. at 287. In State ex rel. Chamberlain v. Howell, supra, 80 Wash. at 696, 142 P. 1, 2, the court upheld the statute requiring those who filed arguments in support of an initiative for inclusion in the state pamphlet required to be published by statute to pay for the resulting increased cost of paper, printing and binding of the state pamphlet. The court said:

But there is nothing in the constitution prohibiting the Legislature from requiring a fee for filing, printing, or binding either the proposed measure or the arguments. It is clear that, where the Constitution does not prohibit the Legislature from requiring a fee in such case, it is within the power of the Legislature to require a fee. . . . The Constitution does not in terms, or inferentially, require the state to bear the expense of the publication of these arguments. It simply requires the Legislature to provide methods of publicity without limitation as to *260 fees. The Legislature, therefore, may require the proponents of any measure to pay the expense of the arguments or of

the distribution or of the publicity. It has not, however, seen fit to do so. . . . This is not an unreasonable requirement, and no provision of the Constitution is cited to us which proclaims such provisions invalid.

In <u>State v. Conifer Enterprises</u>, <u>Inc.</u>, <u>supra</u>, <u>82 Wash.2d at 97</u>, <u>508 P.2d 149</u>, <u>152</u>, the court upheld <u>RCW 29.79.490(4)</u>, making it a crime to pay people to obtain signatures for an initiative petition. The court stated:

It is indisputable that there is a substantial state interest in the integrity of the whole scope of the elective processes, including those procedures involved in the direct legislative efforts of the people via the initiative.

**1354 In 1956 the people adopted Amendment 30 to the State Constitution to change the minimum number of signatures required to qualify an initiative for submission to vote of the people. Const. art. 2, s 1A (amendment 30) provided:

Hereafter, the number of valid signatures of legal voters required upon a petition for an initiative measure shall be equal to eight percentum of the number of voters registered and voting for the office of governor at the last preceding regular gubernatorial election.

Clearly the people made it plain that in order to qualify for the ballot an initiative had to have the minimum number of signatures called for by that amendment. Amendment 30 made no change in the prohibition against counting multiple signatures originally contained in Laws of 1913, ch. 138 and continued in substance thereafter. The prohibition against counting any multiple signatures has continued to be honored by successive secretaries of state until the majority of this court in the instant case held the statutory prohibition to be void. Prior thereto, not only was the prohibition continuously enforced but the petitions including those used to obtain signatures for Initiative Measure No. 322 warned against multiple signatures. Thus under the heading of 'Instructions to Signers and Volunteer Solicitors,' each initiative petition of Initiative Measure No. 322 states:

*261 Voters may sign Initiative No. 322 only once. If a voter signs more than once, that signature is lost completely and the voter is also subject to fine and imprisonment.

In addition, each petition contained a warning pursuant to <u>RCW 29.79.100</u> that 'every person . . . who knowingly signs more than one of these petitions . . . shall be punished by fine or imprisonment or both.'

The legislature, in enacting the prohibition to count multiple signatures was exercising its discretion as to the best method of implementation it considered appropriate to protect the operation of the initiative and referendum process against error and even fraud. The legislature wished to provide some substantial measure of assurance that the signatures on the petition would be validly affixed by legal voters and that such signatures could be expeditiously counted with a minimum chance of error and expense.

It is true the legislature might have determined in the exercise of its discretion that it would be an

adequate sanction if the multiple signatures were counted once for every person signing in that fashion or that an adequate sanction would be provided if the sanction were limited to criminal prosecution. However, the legislature had a right to believe the criminal sanction would be inadequate to prevent multiple signatures because of the requirement of proving beyond a reasonable doubt that the signatory knowingly signed his name more than once. Laws of 1913, ch. 138, s 31, p. 435. Moreover, the possibility of prosecutions might well involve thousands of instances and these prosecutions would necessarily be slow, costly and clog the courts with cases. The legislature therefore had a right to determine in the exercise of its judgment that a more effective remedy was not to count multiple signatures at all. As a matter of fairness in administering the initiative, the petitions carried appropriate warning to signatories that multiple signatures would not be counted at all and could result in a criminal penalty.

We cannot fairly say the prohibition against the counting of multiple signatures does not 'facilitate' the operation of *262 the initiative and referendum process. The legislature had a right to provide a remedy for the evils resulting from multiple signatures. Nor can we say that no reasonably conceivable state of facts exists to justify the legislation. Moreover we are not a super legislature. We cannot substitute our notions of wisdom for that of the legislature. We cannot say as a matter of law, as does the majority, in effect, that the prohibition against counting of multiple signatures at **1355 all does not 'facilitate' the operation of the initiative and referendum process. See Brewer v. Copeland, 86 Wash.2d 58, 542 P.2d 445 (1975); State v. Conifer Enterprises, Inc., supra.

The fact that the 1913 act as amended has so long been observed (1913-1976) makes applicable the rule of statutory construction well stated in <u>State ex rel. Pirak v. Schoettler</u>, 45 Wash.2d 367, 371, 274 P.2d 852, 855 (1954):

When a statute is ambiguous, the construction placed upon it by the officer or department charged with its administration, while not binding on the courts, is entitled to considerable weight in determining the intention of the legislature. Smith v. Northern Pac. R. Co., 7 Wash.2d 652, 110 P.2d 851.

The persuasive force of such an interpretation is strengthened when the legislature, by its failure to amend a statute, 'silently acquiesces' in the administrative interpretation.

See also Morin v. Johnson, 49 Wash.2d 275, 279, 300 P.2d 569 (1956).

Furthermore the fact neither the people nor the legislature made change in the statutory prohibition against counting of multiple signatures is strong evidence that the people, and the legislature saw no legal objection to the prohibition so long observed and assumed to be valid by this court as early as 1914 in State ex rel. Case v. Superior Court, supra.

The majority relies upon Whitman v. Moore, 59 Ariz. 211, 228, 125 P.2d 445 (1942) to support its argument that multiple signatures must be counted at least once per person. The majority, however, fails to note the sentence *263 immediately preceding the language it quotes from. The Arizona court there stated:

It is true that a man declares he has not signed and will not sign any other petition for the same measure, but Nothing in the law states that he shall be disqualified so far as one signature is concerned because he may have inadvertently affixed his signature to another petition for the same measure.

(Italics mine.) In Washington, however, Unlike Arizona, RCW 29.79.200-a valid statute-does disqualify the multiple initiative signatures entirely. Whitman v. Moore, supra, does not support the majority. The case, rather supports the action of the Secretary of State in following the statutory prohibition against counting multiple signatures at all.

THE USE OF REGISTRATION CARDS

The majority also argues the Secretary of State must go outside the registration cards in his office to check the validity of signatures on the initiative petitions. This argument is then followed by a discussion of the evidence to show that had the Secretary gone outside of the registration cards in his office, sufficient additional signatures would have been found to qualify the initiative for the ballot.

There is no claim that RCW 29.79 or any other statute expressly requires the Secretary of State to do this. The majority claims rather than notwithstanding RCW 29.07.090 and RCW 29.07.130, which directs the Secretary of State to check petition signatures by reference to the signatures on registration cards in his office, the Secretary of State is required to go outside those cards because it would improve the accuracy of his count. The majority seeks to justify this approach by claiming the statutes are ambiguous (without particular specification) and this claimed ambiguity should be resolved by requiring the Secretary of State to conduct his checking by recourse to registration cards in the 39 counties of the state.

There are at least two difficulties with this argument. First, it fails to heed what was said by this court in *264State ex re. Evich v. Superior Court, 188 Wash. 19, 30, 31, 61 P.2d 143 (1936), which had the effect of eliminating any ambiguity. In that case the court described the secretary of state's role in determining whether sufficient valid signatures are present. The court stated:

**1356 He is to ascertain the number of names of legal voters on the petition, and the standard manifestly is by comparison with the registration cards In his office certified to him by the local registration officers, in accordance with the provisions of section 13 of the permanent registration act, providing that these registration cards are deposited with him for the sole purpose of

'. . . checking initiative and referendum petitions, and mailing pamphlets containing constitutional amendments, and initiative and referendum measures', etc.

That the secretary of state must compare the signatures on the petition, is further evidenced by Rem.1935 (Sup.), s 5412 (P.C. s 2765), quoted above, requiring him to keep a record of all names appearing on the petition of persons not registered voters and report them to the prosecuting attorneys.

(Italics mine.)

It is noted that this court did not say the Secretary of State was required to check the signatures on the registration cards in the possession of county auditors of each of the 39 counties of the state.

Secondly, if the last cited statutes are ambiguous as claimed, the construction placed thereon by the uniform practice of the office of Secretary of State since 1913 (RCW 29.07.130), without legislative change, provides strong evidence the Secretary of State has no duty to go outside the registration cards in his office for purposes of checking signatures. See Retail Store Employees Union, Local 1001 v. Washington Surveying & Rating Bureau, 87 Wash.2d 887, 558 P.2d 215 (1976); State ex rel. Pirak v. Schoettler, supra.

If a change is to be made in the duties of the Secretary of State, it is for the legislature to do so. Again, it is to be noted this court is not a super legislature. A proper respect for the limitations on this court's powers, in light of the *265 separation of powers doctrine, precludes our substituting our views as to desirable improvements in the applicable legislation for those of the legislature. King County v. City of Seattle, 70 Wash.2d 988, 425 P.2d 887 (1967); Department of Labor and Industries v. Cook, 44 Wash.2d 671, 269 P.2d 962 (1954).

EVIDENCE OF ERRONEOUS COUNT

The final argument of the majority is that If the Secretary of State was under a duty to count multiple signatures by the same person once instead of not at all and, If, the Secretary of State was also under a duty to check signatures against voter registration cards in each of the counties of the state, instead of confining himself to voter registration cards in his office sent there pursuant to RCW 29.07.090, then the record shows there were at least 264 signatures not counted-the number still needed to make up the minimum number of signatures required. Majority opinion, 558 P.2d page 810. The trial court did not so find. Instead, that court necessarily found otherwise by upholding the action of the Secretary of State. See finding of fact No. 1(3); conclusion of law No. 4.

The majority argues in somewhat general terms the evidence shows 'a large number of registered voters' signatures were erroneously rejected. No analysis of the testimony actually given on which petitioner based her claim of erroneous count at trial is set forth. Possibly, however, the majority may have relied on the somewhat lengthy testimony of petitioner's principal supporter of the initiative who testified he was an expert and as such could testify as to the probability of error and the extent thereof. The testimony was necessary to show that there were at least 264 valid signatures not counted. The witness based his testimony concerning the extent of probable error on an alleged random sample of 21 signatures of registered voters from King County, 16 of which were claimed to have been erroneously rejected for want of voter registration cards in the Secretary of State's office. The expert explained his *266 opinion was based on the random nature of the sample. He testified:

**1357 The only thing I can say is based on a random sample. I cannot vouch for whether the sample was chosen randomly or not; but I can give a projection based on the supposition that 16

signatures out of 21 were found to be incorrectly rejected and were chosen randomly. That would be the only basis of my opinion.

The assistant attorney general objected the sample was not a random sample. He stated:

(T)here is simply no evidence in the record that these names that were selected were selected at random. In fact, the testimony is directly contrary to the individuals in question. At least one of them said he picked people he knew or got signatures from and they were all selected from King County.

Statement of facts at 65. The witness was permitted to testify subject to the acceptance of the court of his testimony. At one point the court said concerning the believability of the testimony: the Court has a right to accept or reject any evidence, no matter what the qualifications of the specialist might be.

Statement of facts at 66. His testimony included a cross-examination to test the credibility of the opinions of the witness based upon other hypotheticals and assumptions, including the assumption the sample was not a random sample. Petitioner's attorney at one point stated: 'I'm ready to stipulate we don't have a perfectly random sample . . .'

The trial court had a right to weigh the witness's testimony as it had indicated it would, and to accept it if convincing or to reject it if not. He apparently rejected it as speculative and unconvincing. See finding of fact No. 1(3); conclusion of law No. 4. This rejection was within his power under the familiar rule that the credibility of witnesses is for the trial court. Carson v. Mills, 49 Wash.2d 597, 304 P.2d 712 (1956); N. Fiorito Co. v. State, 69 Wash.2d 616, 618-19, 419 P.2d 586 (1966). I cannot find the trial court abused his discretion in rejecting the testimony. This court lacks *267 power to disregard the court's findings if supported by substantial evidence and then make findings of its own contrary to the trial court's findings. Thorndike v. Hesperian Orchards, 54 Wash.2d 570, 343 P.2d 183 (1959).

The trial court's judgment upholding the refusal of the Secretary of State to certify Initiative Measure No. 322 for the ballot should have been affirmed.

STAFFORD, C.J., and HAMILTON and UTTER, JJ. Wash. 1977.
Sudduth v. Chapman
88 Wash.2d 247, 559 P.2d 1351

END OF DOCUMENT

Supreme Court of Washington, En Banc.

Andrea K. VANGOR; Stephen L. Meerdink; Cindy Pisco; and John and Jane Doe, Appellants,

v.

Ralph MUNRO, Secretary of State, State of Washington, Respondent. **No. 57586-0.**

Nov. 1, 1990.

Sponsor of initiative sought writ of mandamus compelling certification of initiative as having sufficient number of signatures to appear on ballot. The Superior Court, Thurston County, <u>Daniel J. Berschauer</u>, J., denied writ, and appeal was taken. The Supreme Court held that sponsor was not entitled to writ of mandamus.

Affirmed.

West Headnotes

[1] Mandamus 250 © 12

250 Mandamus

250I Nature and Grounds in General

250k12 k. Nature of Acts to Be Commanded. Most Cited Cases

Mandamus will not lie to compel performance of acts or duties which call for exercise of discretion.

[2] Elections 144 \$\infty\$ 103

144 Elections

144V Registration of Voters

144k99 Registration Officers

144k103 k. Powers and Functions in General. Most Cited Cases

Acts of registration officers in comparing and certifying genuine and spurious signatures on petitions are acts of authorized discretion.

[3] Mandamus 250 \$\infty\$74(1)

250 Mandamus

250II Subjects and Purposes of Relief

250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities

250k74 Elections and Proceedings Relating Thereto

250k74(1) k. In General. Most Cited Cases

Sponsor of initiative was not entitled to writ of mandamus compelling certification of initiative as having sufficient number of signatures to appear on ballot; acts by Secretary of State in verifying signatures were discretionary, and clear abuse of discretion was not present which

would amount to failure to exercise discretion. **1152 *537 John Wesley Johnson, Poulsbo, for appellants.

<u>Kenneth O. Eikenberry</u>, Atty. Gen., <u>James Martin Johnson</u>, Sr. Asst. Atty. Gen., Olympia, for respondent.

PER CURIAM.

The sponsor of an initiative seeks review of a Superior Court order denying a writ of mandamus to compel certification of the initiative as having a sufficient number of signatures to appear on the ballot. We affirm the order of the Superior Court denying the writ.

Andrea Vangor is the sponsor of Initiative 534, which would limit the display and dissemination of matters "harmful to minors." On July 6, 1990, Vangor submitted to the Secretary of State petitions for the initiative bearing *538 180,373 names. The Secretary of State later informed Vangor that the initiative could not be certified for inclusion in the November ballot, because the petitions lacked the necessary 150,001 valid signatures. Vangor then filed this mandamus and declaratory relief action in Thurston County Superior Court, challenging the rejection of voter signatures on the basis that the Secretary had not maintained adequate voter registration records. FNI Following a Superior Court order adverse to her position, this request for review was filed.

<u>FN1.</u> Vangor's petition was joined by other initiative proponents; for convenience they will be referred to here jointly as Vangor or appellant.

V. Jean Womer, the Secretary's Elections Assistant and Initiative and Referendum Coordinator, detailed the practices and actions of that office in two affidavits. These indicated that when the Initiative 534 petitions were received on July 6, they were first microfilmed and then sorted and placed in volumes as required by law. Womer's staff trained the verification checkers, and began verification on July 25. They initially examined the signatures to see if they matched the Secretary's file of registered voter signature cards. If a match was found the signature was accepted as valid. Any signature found more than once in the petitions was accepted only once. These duplicates were the only signatures invalidated during this phase of the process.

When a checker was unable to verify a signature, a second and more extensive search was made by a supervisory checker. If a card was still not found, the signature would then be compared to new voter registration cards received from county auditors after the process began. At this point in checking on Initiative 534, the Secretary's staff had accepted 145,412 signatures as valid.

On August 17, Womer and her staff began the final phase of the verification process. They compared previously unaccepted signatures to an alphabetical computer list of county registration records which had been transmitted by the counties to the **1153 Secretary that week. These printouts *539 include current addresses, which are helpful in locating the record of a voter who signed with a different form of his or her name or where the signature or other information is incomplete or illegible.

Womer states her staff received "computer printouts from most of the counties." For some "very small counties, we requested copies of individual records instead of complete printouts." In this final phase of the process, Womer's staff accepted an additional 1,396 signatures, making a total of 146,808.

In her second affidavit, Womer states that subsequent to a 1972 statutory change, county auditors have the sole responsibility for custody of voter registration records at the local level and for transmittal of voter registration cards and other information to the Secretary. Signature cards are maintained by the Secretary alphabetically by county. New cards are added when received, and old cards are removed when registrations are canceled by the county auditors. New cards and cancellations are usually received weekly or monthly, depending upon the size of the county and the volume of transactions. Prior to checking the signatures on an initiative, the office contacts all county auditors to remind them to promptly send new records received before the initiative was submitted.

Womer's office also undertakes periodic comparisons of the Secretary's card file with county lists, updating both the Secretary's records and county files when necessary. Attached to her affidavit is a county-by-county summary of this maintenance program, which suggests that for the entire state the discrepancy between county records and cards on file in the Secretary's office has been 0.5605 percent.

Also before the Superior Court were affidavits of Vangor and initiative proponent Larry L. Lutz. Vangor's affidavit is essentially a narrative of the verification process and her participation in it. She states that, during what Womer characterized as the final phase of the verification process, *540 the Secretary's staff ordered computer printout lists of registered voters from nine counties. Because of her own analysis of the results from four counties, she began to suspect that new voter registration cards were missing from the Secretary's files. She asked Womer and staff if they knew whether new files were being properly forwarded, and was told that counties were "supposed to" send cards.

Vangor also notes that the check of new cards received from Spokane County during the validation process changed the rejection rate for that county from 18.5 percent to 16.5 percent. She further observes that as late as August 17, "well after the master check was completed for Snohomish County, a large number of cards" was received from that county. Vangor did not believe the late receipt of that information affected the outcome, however, inasmuch as her group had registered few voters in that county.

Just before the initiative was submitted, Womer's staff checked King County's records, and proceeded through names beginning with the letters A through G. When using the August printout, however, the staff found about 20 cards were missing from this group of letters.

Lutz projected in his affidavit that if all invalid signatures were checked against computer printouts, the result would be "1,799 accepted signatures" and "502 petition signers whose cards are missing but presumed acceptable."

Finally, Lutz "projects" that "missing data for newly registered voters who signed I-534 has

disqualified an indeterminate number, probably between 2,500 and 3,500, based upon discrepancies known to exist between local records and the Secretary's records." Lutz appears to base this estimate on the discrepancies noted by Vangor between local records on new filings and those of the Secretary. He does not explain how he came up with 2,500 to 3,500 "likely signers" of the initiative from the 7,000 or so discrepancies noted by Vangor.

In its order denying the writ of mandamus, the Superior Court found that neither Vangor nor Lutz qualifies as an expert to **1154 give an opinion on election matters. Assuming *541 their qualification, the court also found that "many of the assumptions" upon which they base their analysis are not well founded. Portions of Vangor's affidavit, in addition, were also struck as hearsay. The trial court concluded that certifying an initiative is a discretionary act, and that mandamus is not available to compel the performance of a discretionary act unless the actions of the public officer are shown to be so arbitrary and capricious as to amount to a failure to exercise discretion. The court concluded that, in maintaining voter records, the Secretary has properly discharged his duties "pursuant to statute and Constitution." The court noted that the Secretary does not have statutory authority to control the performance or timing of all acts of auditors, who perform a necessary part of the process of maintaining voter records.

The court recognized that, under this court's decision in *Sudduth v. Chapman*, 88 Wash.2d 247, 558 P.2d 806, 559 P.2d 1351 (1977), the right of initiative is fundamental and a presumption of validity attaches to petition signatures. The court concluded, however, that the Secretary now maintains his records in accordance with *Sudduth*. While the court concluded that signatures valid at the time made should be counted, even though the voters' registrations were later canceled, the court stated it could not find "from this record this is a significant figure."

Finally, the court concluded that, were the Secretary to accept Vangor and Lutz' statistical analysis, he still would have been bound by the 110-percent requirement of RCW 29.79.200 not to certify the initiative.

Nine assignments of error are listed by appellant which relate to three general issues:

- (1) Whether the trial court erred in applying the ordinary standard of review in mandamus actions for review of discretionary acts.
- (2) Whether the Secretary failed to carry out his duties to maintain proper and correct voter registration records and to evaluate petition signatures by reference to such records.
- *542 3) Whether the Secretary acted arbitrarily and capriciously in the procedures he employed in testing the validity of voter signatures or in concluding that Initiative 534 should not be certified.

The key to resolving each of these issues is found in *Sudduth v. Chapman, supra*. There, the proponent of an "anti-fluoridation" initiative sought a writ of mandate to compel the Secretary to certify the measure. The Secretary rejected the signatures of 4,656 registered voters because they had signed more than once. The proponent for the initiative showed that a number of these rejected signatures were in fact those of registered voters and that the Secretary had failed to go

beyond his card files. In checking 21 rejected signatures against King County files, the initiative proponent found that 16 were from registered voters. Using these figures as a projection, an expert concluded that more than a sufficient number of registered voters had signed petitions.

We reversed, in a 5 to 4 decision, the Superior Court's denial of the writ. Our first conclusion was that <u>RCW 29.79.200</u> was unconstitutional in its provision that in instances of duplicate signatures both would be rejected (rather than counting one of the signatures as valid).

When the signatures which should not have been invalidated on this basis were added to the total, the petitions were still 264 signatures short. The initiative proponent's evidence, however, also tended to show that, because the Secretary's records were not kept current, "a large number of registered voters were erroneously rejected-and most probably a sufficient number to validate the petition." *Sudduth*, 88 Wash.2d at 253, 558 P.2d 806, 559 P.2d 1351. We found a statutory duty resting on the Secretary to keep his records current. We concluded:

It must be remembered that the constitutional provision is self-executing. In a case such as this, where the proponent of a measure was able to discover a substantial number of errors due to inadequacy of records within a very short period of time, and where the evidence shows that the Secretary of State was **1155 aware of the state of his records and does not claim to have taken any steps to see that the situation was corrected, and *543 where out of 13,043 rejected signatures only 264 are needed to qualify the measure, we think that the presumption of validity which attaches to a signature upon a petition must weigh sufficiently in the proponent's favor to entitle her to have the measure placed upon the ballot.

(Footnote omitted.) *Sudduth*, at 255, 558 P.2d 806, 559 P.2d 1351. We accorded a presumption of validity to the signatures only after listing a failure in several regards of the Secretary to keep adequate records which affected a significant number of signatures.

[1][2] Mandamus will not lie to compel the performance of acts or duties which call for the exercise of discretion. *State ex rel. Tubbs v. Spokane*, 53 Wash.2d 35, 38, 330 P.2d 718 (1958). In addition, the acts of registration officers in comparing and certifying genuine and spurious signatures on petitions are acts of "authorized discretion." *State ex rel. Harris v. Hinkle*, 130 Wash. 419, 429, 227 P. 861 (1924).

[3] The trial court concluded that the Secretary's acts in verifying signatures are discretionary, and that, for mandamus to lie, a clear abuse of discretion must be found amounting to a failure to exercise discretion. The trial court harmonized *Sudduth* by indicating that the Secretary in that case had simply ignored his duty under the statute to maintain reasonable records. The facts there support that interpretation inasmuch as it was virtually assured that more than 264 signatures, enough to validate the initiative, had not been counted. The trial court here significantly concluded that the Secretary now maintains its records in accordance with *Sudduth*. Having found that *Sudduth* does not compel a result different from that reached by the trial court in this case, appellant's other arguments do not compel us to reach a result which would overturn the action of the trial court. While appellant suggests other procedures the Secretary might use, they make no argument that would reveal enough new voter registrations to assure certification of her initiative. Error has not been assigned to the trial court's decision to strike portions of appellant's

affidavit as hearsay, or to the trial court's refusal to accept her projections as expert opinion based on valid assumption, or to its *544 conclusion that in any event her statistical evidence falls short of the 110-percent requirement of RCW 29.79.200.

Appellant finally contends that, if the Superior Court was correct in applying the abuse of discretion standard, it should have found several of the Secretary's acts to be arbitrary and capricious. No persuasive argument is made regarding these claims and we find them to be without merit.

The trial court correctly declined to order the Secretary of State to certify Initiative 534 for inclusion on the ballot. The order of the trial court is affirmed.

Wash.,1990. Vangor v. Munro 115 Wash.2d 536, 798 P.2d 1151

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INITIATIVE AND REFERENDUM – Nature of "declaration" on petitions as required by RCW 29A.72.110–.130 as amended by Laws of 2005, ch. 239.

- 1. RCW 29A.72.110-.130, as amended by Laws of 2005, ch. 239, requires each initiative or referendum petition to contain a printed "declaration" concerning signature gathering and the penalties for forged and false signatures, but does not require that such a declaration actually be signed or provide any legal consequences for failure to sign or for signing a false declaration.
- 2. If an initiative or referendum petition fails to contain the printed "declaration" required by RCW 29A.72.110-.130 as amended by Laws of 2005, ch. 239, the secretary of state may refuse to file the petition or accept the signatures on such a petition, under RCW 29A.72.170.

May 31, 2006

Honorable Toby Nixon State Representative, 45th District PO Box 40600 Olympia, WA 98504-0600

Cite As: AGO 2006 No. 13

Dear Representative Nixon:

By letter previously acknowledged, you have requested our opinion on the following paraphrased questions:

- 1. Does Laws of 2005, ch. 239, which provides that a declaration be printed on the reverse side of an initiative or referendum petition, require that a signature gatherer complete the declaration and sign it under penalty of law?
- 2. Under what circumstances does RCW 29A.72.170 authorize the secretary of state to refuse to file petitions that do not comply with the requirements of Laws of 2005, ch. 239?

BRIEF ANSWER

The answer to your first question is no. Laws of 2005, ch. 239 does not require a signature gatherer to sign the declaration required to be printed on the reverse side of the petition. With regard to your second question, if a petition does not contain the statement required by Laws of 2005, ch. 239, RCW 29A.72.170 authorizes the secretary of state to refuse to file the petition.

BACKGROUND

Your questions concern amendments to the statutes that prescribe the form for initiative and referendum petitions. RCW 29A.72.110 sets out the form for initiatives to the legislature. Prior to the 2005 amendments, RCW 29A.72.110 provided:

Petitions for proposing measures for submission to the legislature at its next regular session must be substantially in the following form:

The warning prescribed by RCW 29A.72.140; followed by:

INITIATIVE PETITION FOR SUBMISSION TO THE LEGISLATURE

To the Honorable , Secretary of State of the State of Washington:

We, the undersigned citizens and legal voters of the State of Washington, respectfully direct that this petition and the proposed measure known as Initiative Measure No. and entitled (here set forth the established ballot title of the measure), a full, true, and correct copy of which is printed on the reverse side of this petition, be transmitted to the legislature of the State of Washington at its next ensuing regular session, and we respectfully petition the legislature to enact said proposed measure into law; and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Washington in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.

The petition must include a place for each petitioner to sign and print his or her name, and the address, city, and county at which he or she is registered to vote.

RCW 29A.72.110 (Laws of 2003, ch. 111, § 1812) (emphasis added).

RCW 29A.72.120 prescribes the form of a petition for an initiative to the people and RCW 29A.72.130 prescribes the form of a petition for a referendum. The emphasized language of RCW 29A.72.110 is also found in RCW 29A.72.120 and .130. All three statutes also require that the petition form contain the warning set out in RCW 29A.72.140, which provides:

The word "warning" and the following warning statement regarding signing petitions must appear on petitions as prescribed by this title and must be printed on each petition sheet such that they occupy not less than four square inches of the front of the petition sheet.

WARNING

Every person who signs this petition with any other than his or her true name, knowingly signs more than one of these petitions, signs this petition when he or she is not a legal voter, or makes any false statement on this petition may be punished by fine or imprisonment or both.

In 2005, the legislature amended the three statutes setting out the forms for petitions by adding the following language, which is the subject of your inquiry:

The following declaration must be printed on the reverse side of the petition:

I, , swear or affirm under penalty of law that I circulated this sheet of the foregoing petition, and that, to the best of my knowledge, every person who signed this sheet of the foregoing petition knowingly and without any compensation or promise of compensation willingly signed his or her true name

and that the information provided therewith is true and correct. I further acknowledge that under chapter 29A.84 RCW, forgery of signatures on this petition constitutes a class C felony, and that offering any consideration or gratuity to any person to induce them to sign a petition is a gross misdemeanor, such violations being punishable by fine or imprisonment or both.

RCW 9A.46.020 applies to any conduct constituting harassment against a petition signature gatherer. This penalty does not preclude the victim from seeking any other remedy otherwise available under law.

RCW 29A.72.110–.130, *amended by* Laws of 2005, ch. 239, §§ 1–3. These amendments took effect January 1, 2006. Laws of 2005, ch. 239, § 4.

The form of the petition is important because the secretary of state may refuse to file a petition not containing information required by law. RCW 29A.72.170 provides:

The secretary of state may refuse to file any initiative or referendum petition being submitted upon any of the following grounds:

- (1) That the petition does not contain the information required by RCW 29A.72.110, 29A.72.120, or 29A.72.130.
 - (2) That the petition clearly bears insufficient signatures.
 - (3) That the time within which the petition may be filed has expired.

In case of such refusal, the secretary of state shall endorse on the petition the word "submitted" and the date, and retain the petition pending appeal.

If none of the grounds for refusal exists, the secretary of state must accept and file the petition.

RCW 29A.72.170 (emphasis added).

ANALYSIS

1. Does Laws of 2005, ch. 239, which provides that a declaration be printed on the reverse side of an initiative or referendum petition, require that a signature gatherer complete the declaration and sign it under penalty of law?

Your first question asks whether the 2005 amendments require a signature gatherer to write his or her name in the blank after the word "I" and sign the declaration. In other words, if the signature gatherer fails to fill in his or her name and sign the declaration, does the petition fail to meet the statutory requirements of the 2005 amendments?

"In construing a statute, the court's objective is to determine the legislature's intent. If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (citation and internal punctuation omitted). A statute is ambiguous if it is "subject to more than one reasonable interpretation". *In re the Marriage of Kovacs*, 121 Wn.2d 795, 804, 854 P.2d 629 (1993).

In our view, the 2005 amendments are ambiguous. On one hand, the following language appears to require a declaration:

The following *declaration* must be printed on the reverse side of the petition:

I, , *swear or affirm under penalty of law* that I circulated this sheet of the foregoing petition, and that, to the best of my knowledge, every person who signed this sheet of the foregoing petition knowingly and without any compensation or promise of compensation willingly signed his or her true name and that the information provided therewith is true and correct.

Laws of 2005, ch. 239, § 1. The amendments refer to the statement as a "declaration", there is a blank space for one to fill in his or her name, and the "declaration" uses the language "swear or affirm under penalty of law". Laws of 2005, ch. 239, § 1. It includes a statement, ostensibly that of the signature gatherer, regarding the actions of the voters who have signed the petition. Laws of 2005, ch. 239, § 1. This language is similar to the language required for declarations under RCW 9A.72.085 ("I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct").

It seems anomalous that the legislature would require each petition to include a "declaration" but did not intend that the declaration actually be filled out. However, the 2005 amendments do not include a place to sign or a signature block, in contrast to the declaration under RCW 9A.72.085. Nor do the 2005 amendments contain any language expressly requiring that the "declaration" be signed or specifying the consequences of failure to fill out and sign the declaration. Moreover, the remaining text in the 2005 amendments is not consistent with the typical language of a signed declaration. That part of the text required by the 2005 amendments provides:

I further acknowledge that under chapter 29A.84 RCW, forgery of signatures on this petition constitutes a class C felony, and that offering any consideration or gratuity to any person to induce them to sign a petition is a gross misdemeanor, such violations being punishable by fine or imprisonment or both.

RCW 9A.46.020 applies to any conduct constituting harassment against a petition signature gatherer. This penalty does not preclude the victim from seeking any other remedy otherwise available under law.

Laws of 2005, ch. 239, § 1.

Thus, the remaining text acknowledges the law governing improper signature gathering and sets out the penalty for harassing signature gatherers, but without expressly requiring anyone to swear to facts other than the existence of these laws. These sentences could be part of a "warning" to be printed on the petition. Still, a mere warning would not typically begin with the language characteristic of a signed declaration.

These inconsistencies in the text of the 2005 amendments create ambiguity. Some language points to the conclusion that the amendments require a sworn declaration, while other language (and omissions) suggests that the statement serves as a warning. When a statute is ambiguous, "this court may look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent". *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

Laws of 2005, ch. 239 was introduced as House Bill (HB) 1222. At the initial hearing on HB 1222 before the House Committee on State Government Operations & Accountability, proponents of the bill explained that HB 1222 "represents last session's version of 1660, which did pass out of the House the last two sessions and failed to make it past the Senate". *Test. Pat Thompson, Hr'g HB 1222, House Comm. on State Gov't Operations & Accountability, Feb. 8, 2005. House Bill (HB) 1660, which was not enacted, is useful because it shows where much of the language of HB 1222 originated and how it evolved in the later bill.

Section 1 of HB 1660 was a substantive section, which unambiguously would have required a signed statement:

A new section is added to chapter 29.79 RCW^[2] to read as follows:

Each person circulating a ballot measure petition must sign before a notary public a statement contained on each sheet of the petition affirming, under penalty of perjury, that every person signing that sheet signed his or her name and correctly provided the accompanying information on the signature sheet, and that the person was eligible to sign the petition.

HB 1660, § 1 (emphasis added). Section 2 of HB 1660 would have amended RCW 29A.72.110–.130 by adding the following language to the petitions:

person who signed this sheet of the	or affirm under penalty of perjury, that every foregoing petition signed his or her name and tion on the signature sheet correctly, and that petition.	
Signat Post C	ture	
State of Washington County of		
Signed or attested before me on by		
(Seal or stamp)	(Signature)	
	Title My appointment expires	

HB 1660, § 2.

HB 1660 was amended several times. Second Engrossed Substitute House Bill (ESSHB) 1660 was different from the original version of the bill in several important respects. First,

Available online through TVW at: http://www.tvw.org/MediaPlayer/Archived/WME.cfm?EVNum =2005020128&TYPE=A.

² The statutes governing initiative and referendum elections were recodified as RCW 29A.72A in 2003. Laws of 2003, ch. 111.

section 1 of HB 1660, which would have required signature gatherers to sign before a notary public, was eliminated. The text of the statement to be included on petitions was also changed. Section 1 of ESSHB 1660 would have amended RCW 29A.72.100–.130 to add the following language:

The petition must also include the following statement:

I,, swear or affirm under penalty of law that I circulated this sheet of the foregoing petition, and that, to the best of my knowledge, every person who signed this sheet of the foregoing petition knowingly and without any compensation or promise of compensation willingly signed his or her true name and that the information provided therewith is true and correct. I further acknowledge that under chapter 29A.84 RCW, forgery of signatures on this petition constitutes a class C felony, and that offering any consideration or gratuity to any person to induce them to sign a petition is a gross misdemeanor, such violations being punishable by fine or imprisonment or both.

Signature	
Print Name	
Print Street Address	
Print City, State, Zip Code	

ESSHB 1660, § 1.

HB 1660 and ESSHB 1660 are instructive in understanding HB 1222 in two respects. First, HB 1660, section 1 included a substantive provision requiring the signature gatherer to sign the petition before a notary. This provision was eliminated from ESSHB 1660 and does not appear in HB 1222. Second, both HB 1660, section 2 and ESSHB 1660, section 1 had a place for the signature gatherer to sign. The signature line is missing from HB 1222. Comparing HB 1660 to HB 1222, it appears that the legislature knowingly eliminated the requirement that signature gatherers sign a declaration.

The legislative debate on HB 1222 also demonstrates ambiguity over the import of the new language. Two of the sponsors of HB 1222 were Representatives McDermott and Nixon. When HB 1222 was in committee, Representative McDermott and Representative Nixon each stated that HB 1222 would require signature gatherers to fill in their names and sign the declaration on the petition. Representative McDermott stated:

Thank you Madam Chair. Unfortunately, we have seen instances in the last several years of some fraud and deceit in signature gathering of initiatives and this piece of legislation is one step to being able to hold the signature gatherers accountable, in no way impeding them, inhibiting their ability to gather signatures, but getting their name on, their signature on every initiative petition so that if there are problems we can go back and inquire about them. We'd ask for the committee's support.

House Comm. on State Gov't Operations & Accountability, Hr'g on HB 1222, Feb. 8, 2005³ (emphasis added). Representative Nixon also stated in the committee hearing that signature gatherers would have to sign the petitions:

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Yeah, to, to clarify, at least the intent as I understood it, was that each separate individual page that is being circulated would have this statement on it and that the person who circulated that page would be the one that has to sign that statement. Now, whether that's at the top of the petition or at the bottom or at the back or wherever it might be, I think that also goes to address Representative Clements' concern if everyone who has a copy of the petition sees this statement and at least takes the time to read it and know that they will have to sign it at some point, that serves to inform them of their responsibilities.

House Comm. on State Gov't Operations & Accountability, Hr'g on HB 1222, Feb. 8, 2005 (emphasis added).

However, when HB 1222 reached the House floor for debate, these two sponsors described different understandings. Representative McDermott continued to say that signature gatherers would have to sign the petition. Representative Nixon explained that HB 1222 informed signature gatherers of their responsibility but that the lack of a signature would be of no consequence. Representative McDermott stated:

Thank you Mr. Speaker. As unfortunate as it is, there are rare cases of fraud and forgery in the collection of signatures for initiatives, referendum petitions, in the State of Washington. This bill would require the signature gatherer to sign each page of the petition that they have gathered those signatures and aware of penalties for those acts. It in no way inhibits the gathering of signatures and provides us more accountability for the signatures that are gathered. I would ask the body to join with me in supporting this piece of legislation.

House Floor Debate HB 1222, Mar. 8, 2005⁴ (emphasis added). In contrast, Representative Nixon stated:

Thank you Mr. Speaker. I agree with the good gentlemen. This bill, its primary purpose is to make sure that people who are gathering signatures on initiative and referendum petitions are aware of the penalties associated with forging signatures or paying anyone to sign a petition. It does not create any new penalty. It does not penalize those who fail to sign the statement. But the statement does have to be printed on the initiative petitions. It also does not invalidate the petition forms if the signature is not provided of the circulator. So, again, the primary purpose is to provide information to the petition circulators and I urge your support.

House Floor Debate HB 1222, Mar. 8, 2005 (emphasis added).

After the House passed HB 1222, it was passed by the Senate with amendments, none of them directly bearing on this discussion. When the bill returned to the House, Representatives McDermott and Nixon again emphasized different things. Representative McDermott again described the bill as requiring the signature gatherer to sign the statement:

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⁴ Available online at: http://www.tvw.org/MediaPlayer/Archived/WME.cfm?EVNum=2005030099B &TYPE=A.

Thank you Mr. Speaker. These, the Senate has amended this bill to require that the person gathering the signatures actually sign the back of the petition and that we restate and clarify that anyone harassing the signature gatherer is guilty of harassment charges for those actions. I would ask the body to join me in concurring in this House bill.

House Floor Debate EHB 1222, Apr. 20, 2005⁵ (emphasis added). In contrast, Representative Nixon described the statement only as a notice mechanism for signature gatherers:

Thank you Mr. Speaker. We concur the Senate improved the bill and urge your yes vote. I do note that there were a number of no votes on original passage of this bill off the floor and so would advise members to check how they voted originally. Many of the concerns that had been expressed by constituents about the bill are in fact not true. All the bill really does is inform signature gatherers of the legal penalties associated with falsifying signatures or, and other ways crimes associated with circulating petitions. It does not, in my opinion, increase the likelihood that any signature gatherer would be harassed in any way. And I urge your yes vote.

House Floor Debate EHB 1222, Apr. 20, 2005 (emphasis added). We find the comments of Representatives McDermott and Nixon illuminating because they demonstrate inconsistent understandings about what HB 1222 would require.

We see two possible interpretations of the text starting with: "I, , swear or affirm under penalty of law". Laws of 2005, ch. 239, § 1. One interpretation is that the legislature intended to require signature gatherers to sign an oath which would subject them to the penalty of law if the statement was false. Second, the statement was intended only as a warning to signature gatherers, but there was no intent to require that they fill in a name or sign the statement.

Turning to the first alternative, we conclude that the 2005 amendments do not establish a requirement for a declaration that, if false, could subject signature gatherers to legal penalty. We reach this conclusion for two reasons. First, the evolution of the proposal to put some sort of statement on the petitions from HB 1660 to HB 1222 persuades us that the legislature did not intend such a declaration. The elimination of the substantive requirement in section 1 of HB 1660 and the elimination of a line upon which to sign in HB 1222 indicate that the legislature probably intended to eliminate the signature requirement. Second, even if the legislature intended to punish false swearing, the 2005 amendments are not specific enough to accomplish this purpose. The 2005 amendments provide that a person states that "I, , swear or affirm under penalty of law". Laws of 2005, ch. 239, § 1. The amendments do not specify what "penalty of law" would apply and are unclear as to which parts of the "declaration" (if not all of it) are subject to the signature requirement.

⁵ Available online at: http://www.tvw.org/MediaPlayer/Archived/WME.cfm?EVNum=2005040166A &TYPE=A.

⁶ A variant of this interpretation would be to construe the statute as requiring the declaration to be signed and permitting the secretary of state to decline to file petitions not containing the signed declaration, but not as subjecting the signer to legal penalties for failing to sign or for signing a false declaration. We discuss and reject this variation below.

One would first consider whether this refers to perjury in the second degree, RCW 9A.72.030, or false swearing, RCW 9A.72.040. A person is guilty of perjury in the second degree if

in an examination under oath under the terms of a contract of insurance, or with intent to mislead a public servant in the performance of his or her duty, he or she makes a materially false statement, which he or she knows to be false under an oath required or authorized by law.

RCW 9A.72.030(1). A person is guilty of false swearing if "he makes a false statement, which he knows to be false, under an oath *required or authorized by law*". RCW 9A.72.040(1). Both perjury in the second degree and false swearing require the statement be made under an oath "required or authorized by law". This is a term defined in the statute:

An oath is "required or authorized by law" when the use of the oath is specifically provided for by statute or regulatory provision or when the oath is administered by a person authorized by state or federal law to administer oaths[.]

RCW 9A.72.010(3) (emphasis added). Thus, the 2005 amendments could only subject a person to a criminal penalty for perjury or false swearing if the use of the oath is specifically "provided for" by statute. Unlike section 1 of SB 1660, discussed above, the 2005 amendments lack any express requirement of an oath.⁷

Moreover, it would violate the rule of lenity to read the 2005 amendments as requiring the oath. In criminal cases, "the rule of lenity is a basic and required limitation on a court's power of statutory interpretation whenever the meaning of a criminal statute is not plain. Under the rule of lenity, any ambiguity in the meaning of a criminal statute must be resolved in favor of the defendant." *In re the Personal Restraint Pet. of Hopkins*, 137 Wn.2d 897, 901, 976 P.2d 616 (1999). The 2005 amendments are ambiguous whether a signed declaration is required, so the rule of lenity would apply to prevent a signature gatherer from being convicted of perjury or false swearing if he or she signed a false statement.

A variant interpretation of the 2005 amendments is that the statement is a warning, not an oath, but that signature gatherers must still sign the statement. We also reject this construction. Although Representative McDermott consistently stated that a signature was required, nothing in the 2005 amendments specifies that the signature gatherer must sign the statement, and the form of the "declaration" contains no line upon which to sign. HB 1660 demonstrates that the legislature knows how to require a signature and a signature line. Furthermore, since we have already concluded that there would be no penalty for signing falsely, we are reluctant to conclude

A new section is added to chapter 29.79 RCW to read as follows:

Each person circulating a ballot measure petition must sign before a notary public a statement contained on each sheet of the petition affirming, under penalty of perjury, that every person signing that sheet signed his or her name and correctly provided the accompanying information on the signature sheet, and that the person was eligible to sign the petition.

⁷ HB 1660, § 1 provided:

⁸ Although this demonstrates that the statement would not be the basis for a false swearing or perjury charge, a person who forges signatures or offers consideration to signers may still be charged under RCW 29A.84, as indicated by the statement. Our conclusion is limited to whether there is any "penalty of law" for the declaration which is necessary to determine whether the amendments require a signed statement.

that the signature is required but without any legal consequences for not signing, or even for signing a false declaration.

This leaves us with the second interpretation, which seems most in line with the language of the bill and its legislative history. The 2005 amendments simply require a statement to be included on the petition that warns signature gatherers about the penalties associated with forging signatures or paying anyone to sign a petition. We recognize the rule of statutory construction that the "drafters of legislation are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute". *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). Our interpretation of the 2005 amendments appears to render the words "I, , swear or affirm under penalty of law" superfluous. The declaration does provide a signature gatherer with a place to fill in his or her name to show who circulated a particular petition for signatures. However, in this case, it appears that legislative compromise while enacting HB 1222 resulted in a statute containing language of slight significance. Laws of 2005, ch. 239 is an ambiguous statute and, in our judgment, the best interpretation of it is that the statement required on the petition is an additional warning about the consequences of false signatures, but no more.

2. Under what circumstances does RCW 29A.72.170 authorize the secretary of state to refuse to file petitions that do not comply with the requirements of Laws of 2005, ch. 239?

RCW 29A.72.170(1) provides that the "secretary of state may refuse to file any initiative or referendum petition being submitted [if the] petition does not contain the information required by RCW 29A.72.110, 29A.72.120, or 29A.72.130". Your second question asks whether the secretary of state may refuse to file the petitions if they do not comply with the requirements of Laws of 2005, ch. 239. Our answer to your first question controls the response to question 2. Since the 2005 amendments do not require a signature gatherer to sign the petition, the lack of a name and signature would not be a basis for refusal to file the petitions. However, we conclude that the secretary of state is authorized to refuse to file petitions that omit the statement.

Article II, section 1 of the Washington Constitution establishes the rights of initiative and referendum. Article II, section 1 "is self-executing, but legislation may be enacted especially to facilitate its operation". Const. art. II, § 1(d). After Amendment 7, which established the right of initiative and referendum, the legislature enacted laws to facilitate the process. In *State ex rel. Case v. Superior Court for Thurston County*, 81 Wash. 623, 143 P. 461 (1914), the Court discussed the standard for legislation to facilitate the right of initiative and referendum. According to the Court:

[T]here is strongly suggested, in the language of the constitution and this law, a required liberal construction, to the end that this constitutional right of the people may be facilitated, and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right.

While researching the opinion, we received comments from several parties suggesting that it would be unconstitutional to read the 2005 amendments to require a signed declaration by the signature gatherer, or to reject petitions missing such a signed declaration, as an undue burden on the exercise of the right of initiative and referendum as set forth in article II, section 1 of the Washington Constitution. In light of our conclusions, we express no opinion here as to the extent of the legislature's authority to enact amendments imposing additional requirements concerning the contents of ballot measure petitions.

State ex rel. Case, 81 Wash. at 632 (emphasis added); see also State ex rel. Donohue v. Coe, 49 Wn.2d 410, 416, 302 P.2d 202 (1956).

RCW 29A.72.170 authorizes the secretary of state to refuse to file petitions that do not contain the information required in RCW 29A.72.110–.130. As applied to your questions, this means that if the initiative sponsor failed to include the statement required by the 2005 amendments on a petition, none of the signatures on that petition would be counted. This is a serious consequence. As the Court explained in *State ex rel. Howell v. Superior Court for Thurston County*, 97 Wash. 569, 574–75, 166 P. 1126 (1917), "we are not dealing with the rights of [the sponsor] alone, but with the rights of the several thousand other persons whose names are signed to all these petitions". In *State ex rel. Howell*, the referendum sponsor submitted some signatures attached to a petition on June 4 and some additional signatures on June 6. The secretary of state refused to accept the signatures submitted on June 6, even though it was within the deadline set out in the constitution. The Court ruled that the secretary of state must accept the petitions submitted on June 6. In reaching this conclusion, the Court noted that

there is *nothing in our conclusion* here reached that will in the least *impair the* effectiveness of the facilitating act in so far as it looks to the prevention of fraud and mistake in the exercise by the people of this constitutional right.

State ex rel. Howell, 97 Wash. at 578 (emphasis added).

The Court took up this question again in *Sudduth v. Chapman*, 88 Wn.2d 247, 558 P.2d 806, 559 P.2d 1351 (1977). *Sudduth* considered the constitutionality of RCW 29.79.200, which provided: "If the secretary of state finds the same name signed to more than one petition he shall reject the name as often as it appears." *Sudduth*, 88 Wn.2d at 249. The Court ruled that RCW 29.79.200 was unconstitutional because the intent of the constitution "was to require that an initiative measure be placed upon the ballot if the requisite number of registered voters sign it. Refusing to count a duplicate signer as one petitioner frustrates, rather than furthers this purpose." *Id.* at 251. In reaching this conclusion, the Court again asked:

Is the measure nevertheless necessary to "fairly guard against fraud and mistake"? The respondent does not argue that it is. While there are 20 states having constitutions which provide for the initiative and referendum, he does not suggest that any of them has found it necessary to enact a provision such as that found in RCW 29.79.200....

Id. (citations and internal punctuation omitted).

While we concluded in response to your first question that the 2005 amendments do not require a signed declaration on each petition, the amendments do require a specific printed statement, just as they require each petition to contain certain other information, such as the measure's ballot title and full text. Based on these authorities, we conclude that RCW 29A.72.170 authorizes the secretary of state to refuse to file petitions that do not comply with RCW 29A.72.110-.130 when the requirement in those statutes is designed to prevent fraud or mistake in the exercise of the constitutional right. In this case, the statement required by the 2005 amendments to be printed on the petitions informs signature gatherers about the penalties associated with forging signatures or paying anyone to sign a petition. This requirement is reasonably designed to prevent such fraud. For this reason, we conclude that the secretary of state may refuse to file petitions that do not contain the language required by the 2005 amendments. This could have the effect of not counting valid signatures, but it could also have the effect of eliminating or reducing the number of forged or otherwise invalid signatures because signature gatherers who are aware of the penalties for improperly gathering signatures are less likely to violate the law. Because inclusion of the statement is designed to eliminate fraud and it can be easily complied with, we conclude that the secretary of state may refuse to file petitions without the statement.

The Colorado Supreme Court reached a similar conclusion in *Loonan v. Woodley*, 882 P.2d 1380 (Colo. 1994). Colorado also has initiatives by the people. One requirement imposed on signature gatherers in that state is that to "each petition section shall be attached a signed, notarized, and dated affidavit executed by the registered elector who circulated the petition section, which shall include a statement that *he or she has read and understands the laws governing the circulation of petitions*". *Loonan*, 882 P.2d at 1383. The law in Colorado also provided that a petition "which *fails to conform to the requirements of this article* or is circulated in a manner other than that permitted in this article *shall be invalid*". *Id.* In *Loonan*, the signature gatherers' affidavits failed to include the language that they had read the laws governing the circulation of petitions. The question was whether the signatures on the petitions with defective affidavits could be counted.

As in Washington, the Colorado Supreme Court has held that the

constitutional and statutory provisions governing the initiative process should be liberally construed so that the constitutional right reserved to the people may be facilitated and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right.

Loonan, 882 P.2d at 1384 (internal quotation marks omitted). The Court nevertheless held that a "purpose of the affidavit is the assurance the circulators were aware of their important role in implementing all of the statutory safeguards and in assuring the validity of the signatures they collect". Id. at 1385. And the Court found that the "omission of the required affidavit language conclusively demonstrates that the circulators of the petition did not read those laws much less understand them". Id. at 1386. For this reason, the Court concluded that the affidavits did not comply with the law and found the petitions with the defective affidavit invalid. Id. A federal court subsequently upheld Colorado's affidavit requirement from a federal constitutional challenge, reasoning that "[t]he affidavits 'ensure that circulators, who possess various degrees of interest in a particular initiative, exercise special care to prevent mistake, fraud, or abuse in the process of obtaining thousands of signatures of only registered electors throughout the state." American Constitutional Law Found., Inc. v. Meyer, 120 F.3d 1092, 1099–1100 (10th Cir. 1997), aff'd sub. nom. Buckley v. American Constitutional Law Found., Inc., 525 U.S. 182, (1999) (quoting Loonan, 882 P.2d at 1388–89).

The requirement in Colorado is different from the requirement in the 2005 amendments. However, both are designed to protect the initiative process from fraud. It therefore provides significant precedent for our conclusion that the secretary of state may refuse to file petitions that do not contain the printed statement required by the 2005 amendments.

We trust this opinion will be of assistance to you.

Sincerely,

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